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Nos. 00-832, 00-843

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA, *et al.*,

Petitioners,

v.

GULF POWER COMPANY, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR RESPONDENTS AMERICAN ELECTRIC POWER SERVICE CORPORATION, COMMONWEALTH EDISON COMPANY, DUKE ENERGY CORPORATION, ALABAMA POWER COMPANY, GEORGIA POWER COMPANY, GULF POWER COMPANY, MISSISSIPPI POWER COMPANY AND SAVANNAH ELECTRIC POWER COMPANY

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether 47 U.S.C. § 224 grants the Federal Communications Commission ("FCC") jurisdiction to regulate pole attachments that are simultaneously used to provide high-speed Internet access and conventional cable television programming.

2. Whether 47 U.S.C. § 224 grants the FCC jurisdiction to regulate attachments of wireless telecommunications equipment.

RULE 29.6 STATEMENT

Respondents Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company and Savannah Electric Power Company are wholly-owned subsidiaries of the Southern Company.

Respondent American Electric Power Service Corporation is a wholly-owned subsidiary of American Electric Power Company, Inc.

Respondent Commonwealth Edison Corporation is wholly-owned subsidiary of Exelon Corporation.

Respondent Duke Energy Corporation has no parent or publicly-owned company owning 10% or more of the corporation's stock.

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COUNTERSTATEMENT OF THE CASE

The Pole Attachments Act, Pub. L. No. 95-234, § 6, 92 Stat. 35 (codified as amended at 47 U.S.C. § 224) was enacted in response to a perceived danger of anti-competitive practices by utilities in connection with cable television service. *FCC v. Florida Power Corp.*, 480 U.S. 245, 247 (1987). Cable companies had complained there were no practical alternatives to stringing their cables on utility poles, and that some utilities (principally telephone companies) had exploited their "monopoly" position over these "bottleneck facilities" by charging excessive rates for pole attachments. S. Rep. No. 95-580, at 13 (1977), *reprinted in* 1978 U.S.C.C.A.N. 109, 121. (Addendum A at 5a-6a (hereinafter "Add.")). To address these complaints, and to assist the cable industry (which was then in its infancy), Congress granted jurisdiction to the FCC to "regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable." 47 U.S.C. § 224(b)(1).[1] At the time, both the Administration and Congress expressed concern about granting jurisdiction to the FCC to regulate electric utility companies. H.R. Rep. No. 94-1630, at 33, 34 (1976) (Add. B at 60a-61a), H.R. Rep. No. 95-721, pt. 2, at 10, 12 (1977) (Add. C at 83a, 85a); 123 Cong. Rec. 14,974 (May 17, 1977) (statement by bill's sponsor, Sen. Ernest Hollings) (Add. D at 89a-90a). The Senate Report that accompanied the legislation explained that the FCC's new jurisdiction would be "strictly circumscribed" and triggered only "where space on a utility pole has been designated and is actually being used for communications by wire or cable." S. Rep. No. 95-580, at 15, *reprinted in* 1978 U.S.C.C.A.N. 109, 123 (Add. A at 9a).

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[1] A specific grant of jurisdiction was necessary because, as the FCC itself recognized, the FCC had no jurisdiction under existing law to regulate pole attachments. *California Water & Tel. Co.*, 64 F.C.C.2d 753, 758 (1977); *FCC v. Florida Power Corp.*, 480 U.S. at 248 n.1.

Congress implemented this jurisdictional restriction in three specific ways. First, it defined a "utility" subject to the statute as "a person . . . who owns or controls poles, ducts, conduits or rights of way used, in whole or in part, for wire communications." 47 U.S.C. § 224(a)(1). Second, it defined the "usable space" on a pole as "the space above the minimum grade level which can be used for the attachment of wires, cables, and associated equipment." 47 U.S.C. § 224(d)(2). Third, the Act established strict boundaries on the Commission's exercise of its authority to determine "just and reasonable" rates for pole attachments, the lower end being the "additional costs of providing pole attachments," the upper end being the "fully-allocated costs" associated with the portion of the "usable space" attributable to the pole attachment. 47 U.S.C. § 224(d)(1).

An earlier version of the legislation would have granted the FCC jurisdiction to regulate "any attachment *for wire communication*," but was changed in the final bill at the behest of the FCC to "any attachment by *a cable television system*." H.R. Rep. No. 94-1630, at 2, 30 (Add. B at 29a, 53a-54a). As finally adopted, the Act was narrowly tailored to provide regulated rate coverage only to the cable industry, not to other entities (such as Western Union or the local telephone company) that attach wireline facilities to utility poles. H.R. Rep. No. 104-204, at 91 (1995), *reprinted in* 1996 U.S.C.C.A.N. 10, 58 (noting that Section 224 was intended "to spur the growth of the cable industry").

In the late 1980's, cable companies began to provide services other than conventional video programming. In 1991, the FCC ruled that cable companies that provided commingled cable and other non-video services over the same coaxial cable were entitled to a single, regulated rate under the Pole Attachments Act. That rule was upheld by the D.C. Circuit in *Texas Utilities Electric Co. v. FCC*, 997 F.2d 925, 927 (D.C. Cir. 1993).

The *Texas Utilities* decision, issued five months before the introduction of the first version of what was later to become the Telecommunications Act of 1996, created a regulatory anomaly. At the time, cable operators were expected to move aggressively into the local telephone market; this was one of the motivating factors behind the new legislation. S. Rep. No. 104-23, at 3 (1995) ("Telephone companies are seeking the right to provide cable service in competition with cable companies. Similarly, cable companies are seeking the right to provide telephone service."); H.R. Conf. Rep. No. 104-458, at 148 (1996), *reprinted in* 1996 U.S.C.C.A.N. 10, 160 ("Some of the initial forays of cable companies into the field of local telephony therefore hold the promise of providing the sort of local residential competition that has consistently been contemplated."). Under *Texas Utilities*, however, cable companies that provided telecommunications services were entitled to regulated rates for their pole attachments, while telecommunications carriers providing the same telecommunications services were not.

Congress addressed this regulatory anomaly by adding telecommunications carriers to Section 224 coverage as part of the larger Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56. Congress accomplished this by expanding the definition of pole attachment from "any attachment by a cable television system" to "any attachment by a cable television system *or provider of telecommunications service*." 47 U.S.C. § 224(a)(4) (1994 & Supp. IV 1998) (emphasis added). The 1994 Senate Report accompanying the legislation explains this change was "intended to remedy the anomaly of current law, under which cable systems providing telecommunications services are able to obtain a regulated pole attachment rate under Section 224 of the 1934 Act, while other providers of telecommunications services are unable to obtain a regulated pole attachment rate under Section 224." S. Rep. No. 103-367, at 65 (1994); *see also* H.R. Conf. Rep. No. 104-458, at 206 (1996), *reprinted in*

1996 U.S.C.C.A.N. 10, 200.[2] Congress did not extend Section 224 coverage to *all* telecommunications carriers, but rather excluded incumbent local exchange carriers. 47 U.S.C. § 224(a)(5) ("[f]or the purposes of this section, the term 'telecommunications carrier' * * * does not include any incumbent local exchange carrier"). Incumbent local exchange carriers continue to pay pole attachment rates well in excess of the low regulated rates paid by cable companies and telecommunications carriers.[3]

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[2] The purpose behind the 1996 amendments was *not*, as the FCC stated in the rulemaking below and Petitioner National Cable Television Association ("NCTA") repeats in its brief, "to remedy the inequitable position between pole owners and those seeking pole attachments," Gov't Pet. App. 86a, 13 F.C.C.R. 6777, 6794 ¶31, NCTA Br. at 31. The purpose was to remedy the inequitable position between cable companies providing telecommunications service and telecommunications companies providing telecommunications service.

[3] Petitioners assert that incumbent LECs were excluded from § 224 coverage because "there was no need to provide rate protection to entities that usually owned or controlled the poles themselves." Fed. Pet. Br. at 18. The implication that incumbent LECs own or control all of the poles they use to string their wires is untrue. ILECs typically own less than half of the poles in any service area, and in some regions, less than 20%. The common term "telephone pole" is largely a misnomer; in the majority of cases, incumbent LECs do *not* own or control the poles to which they attach.

Congress excluded incumbent LECs from Section 224 coverage because they were not a fledgling industry that Congress wanted to promote through subsidized pole attachment rates. The Telecommunications Act of 1996 was principally aimed at fostering competition to the incumbent LECs in the local telephone markets. *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 416 (1999). The core provisions of the Act are designed to help other carriers to compete with incumbent LECs by accessing the incumbent LECs' networks. The evident purpose of extending Section 224 coverage to these new carriers and not to incumbent LECs was to provide a financial advantage to the new entrants to help them compete in the local telephone markets.

Congress also made a number of other important changes to the Pole Attachments Act in 1996. These include the following:

First, whereas this Court had held in *FCC v. Florida Power Corp.*, 480 U.S. 245, 251 (1987) that access to utility poles under the 1978 Act was *voluntary* and thus not a taking under the Fifth Amendment, Congress made access *mandatory* by adding a new Section 224(f)(1), which provides that "[a] utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it." 47 U.S.C. § 224(f)(1) (Supp. IV 1998).[4]

Second, Congress prescribed a second pole attachment rate to be established by the FCC. Before 1996, Section 224(d) had set forth a single standard for determining "just and reasonable" rates for attachments by a cable television system. In 1996, Congress provided that the Section 224(d) standard "shall apply to the rate for any pole attachment used by a cable television system *solely to provide cable service*." 47 U.S.C. § 224(d)(3) (Supp. IV 1998) (emphasis added). Congress also provided that the Commission "shall * * * prescribe regulations in accordance with" a different standard "to govern the charges for pole attachments used by *telecommunications carriers* to provide *telecommunications services*." 47 U.S.C. § 224(e)(1) (Supp. IV 1998) (emphasis

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[4] In a ruling not at issue in this appeal, the court below held that the new mandatory access provisions of Section 224(f)(1) effect a taking of utility property under the Fifth Amendment to the U.S. Constitution. Gov't Pet. App. at 18a, 208 F.3d at 1272. The court went on to hold, however, that the question of whether the FCC's rate formula provides just compensation was not yet ripe. Gov't Pet. App. at 19a, 208 F.3d at 1272. Cases challenging the constitutionality of the FCC's rate formula in the context of specific pole complaints currently are pending in the Eleventh Circuit. *Alabama Power Co. v. FCC*, No. 00-14753 and consolidated cases (11th Cir. *filed* September 13, 2000).

added). Much as it had with cable attachments, Congress placed strict boundaries around the FCC's discretion to determine "just and reasonable" rates for telecommunications attachments. 47 U.S.C. § 224(e).

Significantly, several parts of Section 224 remained intact. The 1996 amendments did not change the Act's jurisdictional restriction to utilities which own or control facilities "used, in whole or in part, for any *wire communications*." 47 U.S.C. § 224(a)(1). Nor did Congress change the definition of "usable space" as "the space above the minimum grade level which can be used for the attachment of *wires, cables, and associated equipment*." 47 U.S.C. § 224(d)(2). Indeed, Congress specifically made the concept of "usable space" applicable to attachments for "telecommunications carriers" through the new rate formula established in Section 224(e).[5]

To date, the FCC has implemented the 1996 amendments to the Pole Attachments Act in four separate rulemaking proceedings. This case involves one of those rulemaking proceedings. *In re Implementation of Section 703(e) of the Telecommunications Act of 1996: Amendment of the Commission's Rules and Policies Governing Pole Attach-*

[5] The new Section 224(e) provides, in pertinent part:

* * * *

(2) A utility shall apportion the cost of providing space on a pole, duct, conduit, or right-of-way other than the *usable space* among entities so that such apportionment equals two-thirds of the costs of providing space other than the *usable space* that would be allocated to such entity under an equal apportionment of such costs among all attaching entities.

(3) A utility shall apportion the cost of providing *usable space* among all entities according to the percentage of *usable space* required for each entity.

47 U.S.C. § 224(e).

ments, 13 F.C.C.R. 6777 (1998); Gov't Pet. App. D.[6] As pertinent here, the FCC determined that cable operators are entitled to the benefits of Section 224 when providing commingled Internet and cable services. The FCC based this conclusion on the ground that it "is still obligated under Section 224(b)(1) to ensure that the 'rates, terms, and conditions [for pole attachments] are just and reasonable,' and, as Section 224(a)(4) states, a pole attachment includes 'any attachments by a cable television system.'" Gov't Pet. App. at 90a, 13 F.C.C.R. at 6796 ¶34. Further, the FCC determined that the "just and reasonable rate for commingled cable and Internet service is the Section 224(d)(3) rate," Gov't Pet. App. at 87a, 13 F.C.C.R. at 6794 ¶32, notwithstanding Section 224(d)(1)'s mandate that this rate shall apply to attachments used "solely to provide cable service." 47 U.S.C. § 224(d)(3) (Supp. IV 1998). The Commission explained that its decision was based solely on its regulatory authority under Section 224(b)(1), Gov't Pet. App. at 87a, 13 F.C.C.R. at 6794 ¶33, and not on a determination of whether Internet service was a "cable service" or a "telecommunications service" under Section 224(d) or 224(e). The Commission stated it "need not decide at this time * * * the precise category into which Internet services fit," Gov't Pet. App. at 89a, 13 F.C.C.R. at 6795 ¶34, although it noted it had concluded in an earlier proceeding that "Internet service is not the provision of a telecommunications service under the 1996 Act." Gov't Pet. App. at 87-88a, 13 F.C.C.R. at 6795 ¶33.

The Commission made one other holding in the rulemaking relevant here. It determined that the 1996 amendments extend the "benefits and protections" of Section 224 to

[6] The FCC has completed one other rulemaking, which currently is on review in the Eleventh Circuit. *Southern Co. v. FCC*, No. 99-15160-GG and consolidated cases (11th Cir. *filed* Dec. 16, 1999) (oral argument scheduled Aug. 28, 2001).

attachments of wireless telecommunications equipment. Gov't Pet. App. at 94a, 13 F.C.C.R. at 6798 ¶39.

Electric utility companies filed petitions for review of the FCC's order in the Third, Fourth, Sixth, Eighth, Eleventh, and D.C. Circuits. Pursuant to the FCC's motion, the cases were consolidated in the Eleventh Circuit. The panel reversed the FCC's conclusions that the Pole Attachments Act, as amended in 1996, covers attachments used for commingled cable and Internet service. The panel also reversed the FCC's determination that the Act covers attachments of wireless telecommunications equipment. Petitions for rehearing *en banc* were denied. Petitions for a writ of certiorari were filed by the Government and the NCTA. The Court granted both petitions on January 22, 2001 and ordered the cases consolidated.

SUMMARY OF ARGUMENT

The FCC has regulated an unregulated service (cable Internet service) and an unregulated market (for siting wireless telecommunications equipment) solely for purposes of Section 224. These result-oriented decisions, which grant "subsidized" pole attachment rates to some of the FCC's largest constituents (cable companies and wireless carriers) at the expense of electric utility ratepayers, are beyond the scope of the regulatory power granted by Congress. If Petitioners wish for cable Internet service and wireless telecommunications equipment to be brought within the ambit of pole attachment regulation, their proper appeal is to Congress to change the existing law, not to this Court.

1. In Section 224(b)(1), Congress granted the FCC the power to regulate the "rates, terms, and conditions" of pole attachments to ensure that such "rates, terms and conditions" are "just and reasonable." In Sections 224 (d) and (e), Congress established highly detailed standards to circumscribe the FCC's exercise of its power to establish rates for

pole attachments for two types of service: cable service, which is regulated more broadly under Title VI of the Communications Act, and telecommunications service, which is regulated under Title II. 47 U.S.C. §§ 224(d), (e). Subsections (d) and (e) define and limit the FCC's regulatory power; no other rates are authorized. Congress cannot reasonably be presumed to have provided these detailed standards to define the exercise of the FCC's power to regulate pole attachment rates for cable and telecommunications services, yet to have provided a virtually unlimited power to regulate pole attachment rates for other services (cable Internet services) that the FCC does not otherwise regulate. Congress' grant of power to regulate pole attachment rates cannot rationally be understood to actually *expand* when the services provided over an attachment fall outside the FCC's broader regulatory jurisdiction under the Communications Act.

Petitioners' textual argument rests on the claim that "any attachment by a cable television system" in 47 U.S.C. § 224(a)(4) means "any attachment by a cable television *company*." This argument fails, however, since in 1996 Congress extended the statutory definition of "cable system" to Title II of the Communications Act, which includes Section 224. 47 U.S.C. § 522(7); 47 U.S.C. § 153(7). This definition provides that a "cable system" refers to a set of facilities, not the owner of the facilities, and limits the facilities to traditional cable service where the owner is otherwise regulated by the FCC as a common carrier. 47 U.S.C. § 522(7). Most major cable companies are regulated as common carriers because they provide cable telephony to residential and business customers. Thus, "any attachment by a cable system" means any attachment by facilities used to deliver traditional video programming.

The court of appeals' holding below is fully consistent with Congress' policy pronouncements in the 1996 Act. While

Congress declared a national policy to encourage deployment of the Internet, 47 U.S.C. §§ 157, statutory note, 230(b)(1), Congress also declared that the Internet should be "unfettered by Federal or state regulation." 47 U.S.C. § 230(b)(2). Petitioners' argument that Congress *must* have intended to subsidize cable Internet is based on the faulty logic that a Congressional desire to promote a particular segment of the economy *automatically* translates into a federal subsidy program. There is no support for this assumption, especially given that it would translate into Congress picking winners and losers in the marketplace—in this case, by providing subsidized pole attachments to cable operators for Internet service while denying it to incumbent local exchange carriers, cable's major competitors in the delivery of Internet service.

The rate formulas contained in Sections 224 (d) and (e) are mandatory, not discretionary, and thus compel a decision as to whether cable modem service is a cable service or a telecommunications service. The court of appeals was correct that it is neither. Clearly, it is not a "cable service," the essence of which is the one-way transmission of programming to subscribers, rather than interactive and individual transmission like the Internet. Moreover, it is not a "telecommunications service," despite the appeal of the argument that Internet access service delivered by a cable company should be regulated in the same manner (as a "telecommunications service") as Internet access service delivered by a local exchange carrier. The FCC has already concluded that Internet access is an "information service," not a "telecommunications service," and that Internet access service does not become a "telecommunications service" merely by virtue of the fact that it is offered to customers through a telecommunications pipeline.

2. The court of appeals' holding that Section 224 does not cover wireless telecommunications equipment is also correct. When the Pole Attachments Act was passed in 1978,

Congress made clear that the expansion of FCC jurisdiction was "strictly circumscribed" and limited to dealing with arrangements affecting the "communications space" on utility poles, that is, the space used for the attachments *of wires, cables and associated equipment*. Congress implemented this jurisdiction limitation in the definition of "utility" in Section 224(a)(1) ("a person * * * who owns or controls poles, ducts, conduits or rights-of-way used, in whole or in part, for *wire communications*") and in the definition of the "usable space" on the pole in Section 224(d)(2) ("the space above the minimum grade level which can be used for the attachment of *wires, cables, and associated equipment*"). The concept of "usable space" was incorporated into the standard established in Section 224(d) for attachments by a cable television system.

In 1996 Congress did not change the Act's limitation to the wireline communications space. The definition of "utility" remained unchanged, as did the definition of "usable space." Indeed, the concept of "usable space" (with its limitation to wires, cables and associated equipment) was incorporated into the new statutory formula for telecommunications attachments. 47 U.S.C. § 224(e). Congress cannot have intended Section 224(e) to cover wireless telecommunications equipment when it defined the ratemaking formula for telecommunications attachments in terms of wires, cables and associated equipment.

Congress did not utter a word about siting wireless equipment in Section 703 of the 1996 Act, which amended Section 224. Congress did, however, address the topic at length in the next section of the 1996 Act, which established a "National Wireless Telecommunications Siting Policy." 47 U.S.C. § 332. The court of appeals is correct that the extensive discussion of wireless siting in Section 704, coupled with Section 703's silence on the subject, indicates that Congress did not intend the Pole Attachments Act to cover wireless telecommunications equipment.

This conclusion is supported by the fact that utility poles are not bottleneck facilities for wireless equipment. A thriving free market exists for siting wireless equipment, on towers, on monopoles, on rooftops, on billboards, etc. These unregulated sites typically command rental rates of $1,500 to $2,000 a month, while a regulated pole attachment rate is about $6 a year. Congress surely cannot be presumed to have taken the dramatic step of regulating a tiny segment of the wireless siting market in Section 224 without a word, particularly given its extensive discussion of the subject elsewhere in the same statute.

ARGUMENT

I. SECTION 224 DOES NOT APPLY TO ATTACHMENTS USED FOR DELIVERY OF COMMINGLED CABLE AND INTERNET SERVICE.

The case against Petitioners can be couched in the form of a *reductio ad absurdum* argument, starting with the FCC's absurd result: that notwithstanding Congress' explicit command that the Section 224(d) rate applies to attachments used "solely to provide cable service," attachments for commingled cable and Internet service are entitled to the Section 224(d) rate. Gov't Pet. App. 89a-90a, 13 F.C.C.R. at 6795-6796 ¶34. Since cable modem service is not a "cable service," this holding is directly contrary to the plain language of the statute and cannot be sustained.

The FCC has reached this absurd result—a result so embarrassing it is relegated to a footnote in the Government's brief, Govt. Br. at 26 n.10—because of the FCC's stubborn refusal to rule on the proper regulatory treatment of cable modem service. To be sure, the regulatory treatment of cable modem service has ramifications far beyond the world of pole attachments. Nonetheless, the FCC's insistence on avoiding this decision—coupled with its desire to favor its communications constituents (cable companies) with cheap pole attachment rates at the expense of electric utility ratepayers—has led it to a tortured reading of Section 224. The absurd result is a clear indication that *something*, at least, is wrong with the FCC's reading of the statute.

A. Sections 224(d) and (e) Define And Limit The FCC's Ratemaking Power.

This case involves four subsections of the Pole Attachments Act. The first is Section 224(b)(1)'s grant of power to the FCC to regulate the "rates, terms and conditions for pole attachments." The second is Section 224(a)(4)'s definition of "pole attachment" as "any attachment by a cable television system or provider of telecommunications service." The third and fourth are the specific standards defining and limiting the manner in which the FCC can exercise its Section 224(b)(1) regulatory power: Section 224(d) for "any attachment used by a cable television system *solely to provide cable service*;" and Section 224(e) for "pole attachments used by *telecommunications carriers* to provide *telecommunications services*."

Petitioners' central argument is that the FCC's grant of power in Section 224(b)(1) to regulate pole attachments can be decoupled from the specific standards Congress established for the exercise of that power in subsections (d) and (e). This piecemeal reading of the statute violates the "cardinal rule" that a statute must be read as a whole. *King v. St. Vincents Hosp.*, 502 U.S. 215, 220 (1991). Congress *defined and limited* the FCC's general grant of power to set "just and reasonable rates" for pole attachments through the specific standards set out in subsections (d) and (e) for attachments used for cable service and telecommunications service. As the court held below:

> The straightforward language of subsections (d) and (e) directs the FCC to establish two specific just and

> reasonable rates, one for cable television systems providing solely cable service and one for telecommunications carriers providing telecommunications service; *no other rates are authorized.*

Gov't Pet. App. at 27a; 208 F.3d at 1276 n.29 (emphasis added).

Congress established highly detailed standards in subsections (d) and (e) to define and limit the FCC's exercise of its power to establish just and reasonable rates for cable and telecommunications attachments. Congress cannot reasonably be assumed to have provided these highly detailed standards for the Commission's exercise of its power to set rates for cable and telecommunications attachments, yet to have provided an entirely *unbounded* power to the Commission to set just and reasonable rates for *other* services (including Internet services).[7] There is nothing in the text or the legislative history that would support such a reading.

The FCC acknowledges that prior to 1996, Section 224 set "a single regulated rate for pole attachments" (the "Cable Rate") that "*must* fall within the parameters established by Section 224(d)(1)." *Heritage Cablevision Assocs. v. Texas Utils. Elec. Co.*, 6 F.C.C.R. 7099, 7106 ¶32 (1991) (emphasis added). According to the FCC, Section 224 made "no

[7] This conclusion is supported by the familiar principal of statutory construction which holds that "the express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." *Alexander v. Sandoval*, 149 L. Ed. 2d 517, 2001 U.S. LEXIS 3367, *28 (2001); *see also Northwest Airlines, Inc. v. Transport Workers Union of Am.*, 451 U.S. 77, 93-94 (1981) ("[T]he comprehensive character of the remedial scheme expressly fashioned by Congress strongly evidences an intent not to authorize additional remedies."). Surely the express provision of detailed sets of standards in subsections (d) and (e) for cable and telecommunications services suggests that Congress intended to preclude regulation of attachment rates for other types of services.

provision for disparate rates based on the type of service provided." *Id.* at 7106 ¶31. Rather, Section 224 "permit[ted] a single, regulated, just and reasonable rate for pole attachments." *Id.*

In 1996, Congress amended Section 224 to cover telecommunications companies. In doing so, Congress sought to level the playing field between cable companies providing telecommunications services and competing telecommunications companies providing the same services. Congress provided an additional rate for "pole attachments used by telecommunications carriers to provide telecommunications services." 47 U.S.C. § 224(e) (the "Telecom Rate"). As it had done in 1978 with regard to the Cable Rate, Congress again specifically limited the FCC's discretion in setting the Telecom Rate by defining what satisfies the "just and reasonable" standard. 47 U.S.C. § 224(e). There are two rates under the Act and two rates only.

This conclusion is underscored by the restrictions Congress placed on the FCC's ratemaking power elsewhere in the Telecommunications Act of 1996. In Section 252(d)(1), Congress granted the FCC power to prescribe standards for rates to be charged for new entrants to interconnect with, or lease elements of, incumbent LECs' existing networks.[8] As in Section 224, Congress did not grant this power under an unqualified "just and reasonable" standard, but rather specifically prescribed that the rates must be "based on the cost . . . of providing" interconnection or the network element. 47 U.S.C. §§ 251(c)(3), 252(d)(1). Congress further qualified this power by requiring that these rates be

[8] Challenges to the FCC's TELRIC rules implemented pursuant to this authority were granted by this Court on the same day the Court granted cert. in the instant cases. *Verizon Communications, Inc. v. FCC*, Nos. 00-511, 00-555, 00-590 and 00-602 (*cert. granted* Jan. 22, 2001).

"determined without reference to a rate-of-return or other rate-based proceeding" of the kind that had traditionally been used to set the incumbents' local retail rates. 47 U.S.C. § 252(d)(1)(A)(i). The fact that Congress did not grant the FCC ratemaking power under a bare "just and reasonable" standard in the interconnection provisions of the 1996 Act supports the notion that Congress did not grant the FCC power to set rates under a bare "just and reasonable" standard elsewhere in the same statute.[9]

This reading also is consistent with the larger structure of the Communications Act of 1934, which provides separate and comprehensive schemes of regulation for cable service (Title VI) and for telecommunications service (Title II). A service that does not fit into one of these regulatory boxes is unregulated. It is only natural for Congress to require that a service must be regulated generally (either under Title VI as a cable service or Title II as a telecommunications service) in order to be subject to regulation for pole attachment purposes.

B. The FCC Cannot Avoid Classifying Cable Modem Service.

Another reason the FCC's tortured approach to Section 224 is unreasonable is that subsections (d) and (e) are mandatory,

[9] Congress' use of the "just and reasonable" standard traces its origin to the Interstate Commerce Act of 1887, 24 Stat. 379 (1887), through which Congress created the Interstate Commerce Commission and granted it the power to set "just and reasonable" rates for railroads. *See generally* Joseph D. Kearney, *The Great Transformation of Regulated Industries Law*, 98 Colum. L. Rev. 1323 (1998). This Court has held the "just and reasonable" standard bestows a virtually unlimited power to set rates. *See FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 602, 611 (1944); *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 310 (1989). In the Telecommunications Act of 1996, Congress chose not to grant the FCC ratemaking power under the historical "just and reasonable" standard (with all the unbridled discretion that entails), but instead provided detailed guidance for the Commission's exercise of its ratemaking power.

not discretionary. Section 224(d)(3) says "[t]his subsection *shall* apply to the rate for any pole attachment used by a cable television system to provide cable service." 47 U.S.C. § 224(d)(3) (emphasis added). Section 224(e)(3) states: "The Commission *shall* * * * prescribe regulations in accordance with this subsection to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services." 47 U.S.C. § 224(e)(3) (emphasis added). The FCC admits that these rates are mandatory:

> We note that in the one case where Congress affirmatively wanted a higher rate for a particular service offered by a cable system, it provided for one in section 224(e). In requiring that the Section 224(d) rate apply to any pole attachment used 'solely to provide cable service,' we do not believe Congress intended to bar the Commission from determining that the Section 224(d) rate methodology also would be just and reasonable in situations where the Commission is not *statutorily required to apply the Section 224(e) rate.*

Gov't Pet. App. at 90a, 13 F.C.C.R. at 6796 ¶34 (emphasis added). At the very least, therefore, it is far more natural to read the statute as asking the Commission first to determine whether the mandatory rates prescribed by subsections (d) or (e) apply, since, if they do, that is the end of the matter and there is no need to determine whether the Commission has discretion to set rates for services that hypothetically might fall outside of the "cable service" or "telecommunications service" classifications. The Commission's explicit refusal to undertake this analysis[10] underscores the capriciousness of its ruling.

[10] "We need not decide at this time, however, the precise category into which Internet services fit. Such a decision is not necessary in order to determine the pole attachment rate applicable to cable television systems

Ironically, the implausibility of severing the Commission's general grant of regulatory power under Section 224(b)(1) from the implementing standards set out in subsections (d) and (e) is underscored by the Commission's very attempt to exercise its Section 224(b)(1) power. The Commission undertook its analysis in two steps. First, it determined whether it had the power to regulate commingled cable and Internet attachments, then it considered what rate would apply. In the first step, the Commission bifurcated the statute and determined that Section 224(b)(1), standing alone, empowers it to regulate commingled cable and Internet attachments. In the second step, however, the FCC yoked the statute back together, turning to the specific standards established by Congress to conclude that the "just and reasonable rate for commingled cable and Internet service is the Section 224(d)(3) rate." Gov't Pet. App. at 87a, 13 F.C.C.R. at 6796 ¶32. Setting aside that the Section 224(d)(3) rate applies to attachments *solely to provide cable service* (which commingled cable and Internet attachments are not), this exercise shows that in practice, the FCC found itself compelled to use the standard set by Congress in Section 224(d) to implement its Section 224(b)(1) power. The Act is no more severable as a practical matter than it is as a matter of law.

C. A "Cable Television System" Is Not Synonymous With A Cable Company.

Petitioners' textual argument rests entirely on the proposition that "[a]n attachment by a cable television system that is used to provide commingled cable television service and Internet access is an attachment 'by a cable television system' as that term is used in 47 U.S.C. § 224(a)(4)." Gov't Br. at 11. This argument in turn rests on the assumption that

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using pole attachments to provide traditional cable services and Internet services." Pet. App. 89a, 13 F.C.C.R. at 6795 ¶34.

"cable television system" refers to a cable *company*, and thus that anything a cable company attaches to a pole is a "pole attachment" for purposes of Section 224.

This argument does not withstand scrutiny. Congress defined the term "cable system" in the Cable Act of 1984 to refer to a set of facilities, *not* the operator of the facilities:

> [T]he term "cable system" means a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include * * * * (C) any facility of a common carrier which is subject, in whole or in part, to the provisions of title II of this Act, except that such facility shall be considered a cable system * * * * to the extent such facility is used in the transmission of video programming directly to subscribers, unless the extent of such use is solely to provide interactive on-demand services.

47 U.S.C. § 522(7).[11] "Cable operator" is separately defined, 47 U.S.C. § 522(5), as is "cable service," 47 U.S.C. § 522(6).

Prior to the 1996 Act, the "cable system" definition applied only to Title VI of the Communications Act, not to Title II (which includes Section 224). In 1996, however, Congress extended the "cable system" definition to the Communications Act as a whole (including, of course, Section 224). 47 U.S.C. § 153(7).

Thus a "cable system," as that term is defined and used in Section 224(a)(4),[12] refers to a set of facilities operated by a

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[11] The FCC has issued regulations defining the terms "cable system" and "cable television system" with the same language Congress used in 47 U.S.C. § 522(7). 47 C.F.R. § 76.5(a) (2000).

cable company, not to the cable company itself; and if the cable company is regulated as a common carrier, then its facilities are a "cable system" *only to the extent they are used to transmit video programming*. 47 U.S.C. § 522(7). In other words, if a cable company provides telecommunications service and thus is regulated by the FCC as a common carrier, then its network is deemed to be a "cable system" only to the extent it is used to transmit traditional cable service. This distinction in the "cable system" definition (47 U.S.C. § 522(7)) tracks directly with the distinction between attachments used *solely to provide cable service* and attachments used to provide *tele-communications service* in 47 U.S.C. §§ 224 (d) and (e).

In fact, most major cable companies are now common carriers subject, in part, to the provisions of Title II, through the delivery of residential and/or commercial telephone service over the cable company's fiber optic network. Petitioner NCTA's January 2001 Cable Television Handbook, which can be downloaded from NCTA's web site, acknowledges that "[t]he cable industry is now expanding its competitive offerings to include business and residential telephone as well as data services." NCTA, *Cable Television Handbook* 6-D-1 (2001), *available at* http://www.ncta.com/pdf_files/Handbook-Total.pdf. The Handbook notes that "[a]t least nine of the nation's largest multiple system operators (MSOs) now offer residential and/or commercial phone service in more than 45 markets overall, and companies have reached interconnection agreements in 40 states and the District of Columbia."[13]

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[12] Section 224(a)(4) uses the term "cable television system," not "cable system," but as noted at note 10, *supra*, the FCC's regulations treat these two terms as synonymous. 47 C.F.R. § 76.5(a).

[13] The nine cable companies include Adelphia Business Solutions/Hyperion, Cablevision Systems, Cablevision Lightpath, Comcast Cable, Cox Communications, Cox Fibernet, AT&T Broadband,

Where cable companies are common carriers, their facilities are "cable systems" only to the extent they are "used in the transmission of video programming directly to subscribers" under 47 U.S.C. § 522(7). Since Internet access provided by cable modem service clearly is not the transmission of video programming directly to subscribers, Petitioners' textual argument that the phrase "any attachment by a cable television system" in Section 224(a)(4) includes cable modem service is meritless.

Prior to 1996 it was unclear whether Congress intended its definition of "cable system" to apply to Section 224. *Texas Utilities Elec. Co. v. FCC*, 997 F.2d 925, 931-932 (D.C. Cir. 1993). The D.C. Circuit relied on this ambiguity in *Texas Utilities* in affirming the FCC's reading of "cable television system" as referring to a cable company, rather than a set of facilities. *Id.* at 932. Congress eliminated that ambiguity in 1996 by extending the "cable system" definition (47 U.S.C. § 522(7)) to the entire Communications Act. 47 U.S.C. § 153(7). While there is still some awkwardness in the

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Service Electric Cable, Time Warner Cable, and Time Warner Telecom. *Id.* at 6-D-4-6.

Cable companies are also required to report their telecommunications revenues to the FCC on Form 499-A. The FCC publishes a report listing companies that provided interstate telecommunications service, which includes the cable companies identified above and many other cable companies not listed in the NCTA Handbook. *See* Katie Rangos and Jim Lande, *Carrier Locator: Interstate Service Providers* (FCC Common Carrier Bureau, Oct. 2000), *available at* http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/Locator/locat00.pdf. The FCC uses the data reported on Form 499-A to calculate contributions required of cable companies and other carriers under Title II to the universal service fund and other cost-sharing mechanisms. *See* FCC, *Instructions for Completing the Worksheet for Filing Contributions to Telecommunications Relay Service, Universal Service, Number Administration, and Local Number Portability Support Mechanisms* (2001), *available at* http://www.fcc.gov/Forms/Form499-A/499a.pdf.

statutory language (any attachment *by* a set of facilities rather *for* or *of* a set of facilities), Congress' application of the "cable service" definition to Section 224 in 1996 effectively puts an end to this debate. Congress has said a "cable system" is a set of facilities, and that is the end of the matter. Even if this creates unanticipated consequences (deregulating cable company attachments when cable companies enter the competitive marketplace for Internet access), this is what Congress has said. "If this is not what Congress meant, then Congress has made a mistake and Congress will have to correct it." *Conroy v. Anishoff*, 507 U.S. 511, 528 (1993) (Scalia, J., concurring).

D. Cable Modem Service Is Neither A Cable Service Nor A Telecommunications Service.

1. Cable Service

The Communications Act defines "cable service" as "(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service." 47 U.S.C. § 522(6). Video programming, in turn, is defined as "programming provided by, or generally considered comparable to programming provided by, a television broadcast station," 47 U.S.C. § 522(20), and "other programming service" means "information that a cable operator makes available to all subscribers generally," 47 U.S.C. § 522(14).

The FCC, in fact, already has determined that Internet service is in no way "comparable" to video programming provided by a television broadcast station and thus "falls outside the definition of 'video programming'" under the Communications Act. *In re Internet Ventures, Inc.*, 15 F.C.C.R. 3247, 3254 ¶13 (2000). Nor does Internet service constitute an "other programming service," which is limited

to "information that a cable operator makes available to all subscribers generally." 47. U.S.C. § 522(14). Many of the services provided via the Internet, whether it is the ability to send and receive e-mails, participate in chat rooms, or to create and access a unique home page on a "portal" such as Yahoo!, involve content organized in a format dictated and seen exclusively by that customer. As the Ninth Circuit stated in *AT&T Corp. v. City of Portland*, 216 F.3d 871, 876 (9th Cir. 2000):

> Internet access is not one-way and general, but interactive and individual beyond the 'subscriber interaction' contemplated by the statute. Accessing Web pages, navigating the Web's hypertext links, corresponding via e-mail, and participating in live chat groups involve two-way communications unmatched by the act of electing to receive a one-way transmission of cable or pay-per-view television programming.

216 F.3d at 876. The essence of cable service, therefore, is "one-way transmission of programming to subscribers generally." *Id.* Internet service does not fit this definition.[14]

Furthermore, applying the "carefully tailored scheme of cable television regulation to cable broadband access would lead to absurd results, inconsistent with the statutory structure." *AT&T Corp. v. City of Portland*, 216 F.3d at 877. The court summarized this as follows:

> [C]able operators * * * may be required by the franchising authority to set aside cable channels for public, educational or governmental use, see 47 U.S.C. § 531, must designate some of their channels for commercial use by persons unaffiliated with the

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[14] The FCC acknowledged in its *amicus* brief in the *City of Portland* case that "[s]trong arguments have been advanced in support of the argument that Internet access via cable is *not* a cable service." Br. at 20.

> operator, see 47 U.S.C. § 532, and must carry the signals of local commercial and non-commercial educational television stations, see 47 U.S.C. §§ 534 & 535. We cannot rationally apply these cable television regulations to a non-broadcast interactive medium such as the Internet.

Id.

The Ninth Circuit's analysis in *City of Portland* is consistent with the Eleventh Circuit's reasoning below in so far as both courts rejected the argument that Congress intended to include Internet service in the statutory definition of "cable service." The only difference in the definition of "cable service" between the 1978 Act and the 1996 Act is the inclusion of the words "or use" in § 522(6)(B) ("subscriber interaction, if any, which is required for the selection *or use* of such video programming or other programming service"). The single sentence of legislative history which attempts to explain this addition states that the inclusion of "or use" was meant to "reflect [ ] the evolution of video programming toward interactive services." H.R. Rep. No. 104-204 at 97 (1995), *reprinted in* 1996 U.S.C.C.A.N. at 64. The Eleventh Circuit reasoned in the opinion below:

> Although what it means to reflect an evolution of video programming toward interactive service is not exactly clear, it is clear from Congress' lack of discussion of this change that it was minor in both language and intent. If Congress by the addition of these two words meant to expand the scope of the "cable service" definition from its traditional video base to include all interactive services, video and non-video, it would have said so. Without any substantive comment, we will not read this minor change to effectuate a major statutory shift.

Gov't Pet. App. 28a, 208 F.3d at 1276-1277. Surely this is correct. As this Court has said, "Congress * * * does not alter

the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. American Trucking Ass'ns, Inc.*, 121 S. Ct. 903, 910 (2001).

2. Telecommunications Service.

While cable modem service is clearly not a "cable service," it is also not a "telecommunications service." The Communications Act defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public regardless of the facilities used." 47 U.S.C. § 153(46). The crux of the argument in favor of classifying cable modem service as a "telecommunications service" is that cable modem service consists of two elements: a "pipeline" and the Internet service transmitted through that pipeline. *AT&T v. City of Portland*, 216 F.3d at 878.[15] This tracks the definition of an "information service," which means "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information *via telecommunications* * * *." 47 U.S.C. § 153(20) (emphasis added). The FCC has defined Internet access service as an information service. *In re Federal State Joint Board on Universal Service*, 13 F.C.C.R. 11,501, 11,532-11,533 ¶66 (1998). Because information service is *by definition* provided "via telecommunications" (*e.g.*, through the "pipeline"), the provision of Internet access via cable modem service must either *be* a telecommunications service, the argument goes, or *include* a telecommunications service.

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[15] *Amici* United States Telecom Association, *et al.*, echo the Ninth Circuit's "pipeline" metaphor when they say that "[w]hatever else the cable operator is doing, it is serving as a basic transparent conduit from a user's residence to the ISP point of presence (and the Internet beyond) * * *." Br. at 7-8.

Certainly this argument has appeal, as indeed do the arguments by *amici* United States Telecom Association, *et al.* to the effect that cable modem service should be regulated in the same way as their xDSL service, which the FCC has classified as a telecommunications service. *See In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 15 F.C.C.R. 385, 388-389 ¶9 (1999); *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 F.C.C.R. 24,011, 24,030 ¶36 (1998); *see also AT&T Corp. v. City of Portland*, 216 F.3d 871, 879 (9th Cir. 2000). The phone companies' xDSL service provides the same high-speed Internet access as cable modem service, the only difference being the service is provided over phone lines rather than a cable network. However appealing, though, the argument ultimately fails, because the FCC has already ruled that the fact Internet service is provided "via telecommunications" (through a "pipeline"), without more, is not enough to transform that service into a "telecommunications service."

The FCC has ruled that "telecommunications services" and "information services," are "mutually exclusive." *In re Federal State Joint Board on Universal Service*, 13 F.C.C.R. 11,501, 11,508 ¶13 (1998). As noted *supra*, the FCC has ruled that Internet service is an "information service," 13 F.C.C.R. at 11,532-11,533 ¶66, but has also held that entities providing information services "are not thereby providing 'telecommunications service.'" 13 F.C.C.R. at 11,516 ¶33, *citing In re Federal State Joint Board on Universal Service*, 12 F.C.C.R. 8780, 9179-80, ¶¶788-89 (1997). The FCC explained that "a single entity can be both a telecommunications provider and an information services provider, but only in connection with its offering of separate services; it cannot gain that dual status merely as a result of its offering of a single service." 13 F.C.C.R. at 11,520 ¶39 n.77. In short, the Commission has concluded, "[a]n offering that constitutes a single service from the end user's standpoint

is not subject to carrier regulation simply by virtue of the fact that it involves telecommunications components." 13 F.C.C.R. at 11,529-11,530 ¶58. These conclusions, of course, are subject to customary deference. *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984).[16]

To be sure, the FCC has declined to apply this analysis to cable modem service,[17] and has issued a "Notice of Inquiry" to solicit views regarding what regulatory treatment, if any, should be accorded to cable modem service. However, there is no apparent reason the Commission's existing analysis of "hybrid" services should not apply to cable modem service, nor any indication of when, or even if, the FCC intends to rule on the subject. *See In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, FCC No. 00-355, GN Docket No. 00-185 (Sept. 28, 2000).[18]

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[16] The FCC's determination that Internet service is not a telecommunications service is consistent with the definition of "Internet access service" enacted by Congress in 1998 as part of the Child Online Protection Act, Pub. L. No. 105-277 § 1402 (1998), 112 Stat. 2681-736, (codified at 47 U.S.C. § 231). This statute, which is being challenged on First Amendment grounds in this Court in *Ashcroft v. ACLU*, No. 00-1293 (*cert. granted* May 21, 2001), defines Internet access service as a "service that enables users to access content, information, electronic mail, or other services offered over the Internet, and may include access to proprietary content, information, and other services as part of a package of services offered to consumers. *Such term does not include telecommunications services.*" 47 U.S.C. § 231(e)(4) (emphasis added).

[17] "We express no view in this Report on the applicability of this analysis to cable operators providing Internet access service." 13 F.C.C.R. at 11,535 ¶67 n.140.

[18] The FCC's regulations provide that "proceedings commenced issuing a 'Notice of Inquiry' * * * do not result in the adoption of rules, and Notices of Inquiry are not required to be published in the Federal Register." 47 C.F.R. § 1.430 (2000). Thus, the FCC cannot adopt rules governing the classification of cable modem service until the current proceeding is complete and the Commission undertakes a formal notice

Given the fact that five years after the passage of the 1996 Act there still are no visible signs that an FCC ruling on this issue is imminent, this Court should take the responsibility to decide this important question. Given the FCC's track record here, Petitioners' pleas that the issue should be remanded to the FCC have a distinctly hollow ring. The FCC's rulings in the Universal Service Order give the Court all the analytical tools necessary to resolve this issue and put this debate to an end.

E. The Eleventh Circuit's Decision Is Fully Consistent With Congress' Policy Of Promoting Deployment Of High-Speed Services.

Petitioners argue that the decision below is contrary to Congressional policy promoting high-speed Internet access. Even if the Court is compelled to reach beyond the clear language of the statute to address these policy arguments, Petitioners' arguments fail because the court of appeals' decision is fully consistent with Congressional policy.

In 1996, Congress directed the FCC to "encourage the deployment * * * of advanced telecommunications capability to all Americans * * * by * * * regulating methods that remove barriers to infrastructure investment." 47 U.S.C. § 157, statutory note. In addition, in Section 509 of the 1996 Act, Congress stated "[i]t is the policy of the United States * * * to promote the continued development of the Internet and other interactive computer services and other interactive media." 47 U.S.C. § 230(b)(1). According to Petitioners, these two sections stand for the proposition that Congress cannot have intended to "penalize" the cable industry by eliminating rate regulation for attachments used by cable companies for the delivery of high-speed Internet services.

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and comment rulemaking, commenced by publication of a Notice of Proposed Rulemaking in the Federal Register.

Conspicuously absent from Petitioners' recitation of policy is 47 U.S.C. § 230(b)(2), in which Congress further declared: "It is the policy of the United States * * * to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, *unfettered by Federal or State regulation.*" 47 U.S.C. § 230(b)(2) (emphasis added). More fundamentally, it is one thing for Congress to declare a national policy to promote the deployment of the Internet; it is quite another for Congress to "pick winners and losers" in the Internet marketplace by bestowing a financial advantage on one group of Internet providers (and not others) through the mechanism of rate regulation. In the 1996 Act, Congress extended pole attachment rate regulation to telecommunications carriers, but *excluded* incumbent local exchange carriers. 47 U.S.C. § 224(a)(5). Incumbent local exchange carriers are the cable industry's largest competitors in the delivery of Internet service.[19] Placing cable Internet service outside of Section 224 means that cable companies and their chief competitors in the Internet business must pay the same unregulated rates for Internet attachments. Surely it is not reasonable to assume that Congress intended *sub silentio* to "subsidize" the

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[19] The FCC recently reported that "[m]ost residential and small business consumers currently receive Internet service from ISP's via traditional 'dial-up-telephone services provided by local exchange carriers (LECs) over copper wire. *In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, FCC No. 00-355, GN Docket No. 00-185 (Sept. 28, 2000). In the area of high-speed Internet access, of the 4.3 million broadband lines the FCC recently reported to be connecting homes and small businesses to the Internet, nearly one million are served by asymmetric digital subscriber lines (ADSL) provided by local exchange carriers. FCC, *Federal Communications Commission Releases Data on High-Speed Services for Internet Access* (Oct. 31, 2000), *available at* http:www.fcc.gov/Bureaus/Common_Carrier/ News_ Re-leases/2000/nrcc0054.html. Moreover, the number of customers served by local exchange carriers increased 157% during the first half of 2000, *id.*, a trend which can be expected to continue.

cable industry's provision of high-speed Internet service, while simultaneously excluding this "subsidy" for their principal competitors. That conclusion would be anathema to a "free market . . . *unfettered by Federal or State regulation.*" 47 U.S.C. § 230(b)(2) (emphasis added).

II. SECTION 224 DOES NOT COVER ATTACHMENTS OF WIRELESS TELECOMMUNICATIONS EQUIPMENT.

Petitioners and their supporting *amici* [20] argue that Section 224(a)(4) defines a covered pole attachment as "any attachment . . . by a provider of telecommunications service," that "provider of a telecommunications service" includes wireless carriers, and thus that wireless carriers are entitled to a regulated rate for any type of facility they wish to attach, whether it is "wireless, wireline or some hybrid type of facility." Gov't Br. at 14.

This argument, while appealing, ultimately fails. It fails, in large part, because it focuses woodenly on the word "any" in the phrase "any attachment" and fails to ask the more pertinent question, which is what did Congress mean by an "attachment." Read as a whole, the statute and its legislative history make clear that Congress intended "attachment" to refer to wireline facilities.[21]

It is important to clarify that the question here is *not* whether Section 224 applies to attachments by wireless carriers. It most certainly does, and the utilities have never

[20] The wireless companies and trade associations are participating in this case as *amici curiae*, rather than as petitioners, because they did not participate in the case before the Eleventh Circuit.

[21] Surely *some* form of limiting principle applies to the phrase "any attachment." Congress can hardly have intended Section 224 to mandate access for cable or telecommunications companies to hang anything at all, from advertising banners to clothes lines, on utility poles.

argued to the contrary. The dispute pertains to the *type of facilities* a wireless carrier can attach subject to Section 224 coverage; the question is whether Section 224 extends to wireless *equipment*, not to wireless *carriers*.[22] The utilities argued below, and the court of appeals agreed, that wireless *equipment* is not covered. The utilities have never taken the position that the *wireline* segments of a wireless carrier's network are outside of the statute. Petitioners' argument on this point is a complete red herring. Despite some imprecise language, the court of appeals' opinion is best read to hold that the FCC lacks jurisdiction to regulate attachments of wireless *equipment*, not wireless *carriers*. Thus, to the extent a wireless carrier seeks to attach a wireline facility to a utility pole, whether for "traffic backhaul, redundancy, intermodal operations," or other purposes, Br. of Association for Local Telecommunications Services, *et al.* as *Amici Curiae* (hereinafter, "Wireless *Amici*"), at 14, the wireline attachment is subject to Section 224.[23]

[22] Wireless equipment is vastly different from wireline attachments. Unlike wireline attachments, wireless equipment has no need to be installed through the linear corridors of the poles, ducts, conduits and rights-of-way of a utility's distribution system. A wireless antenna is a discrete single point installation. Physically, wireline and wireless attachments are completely different. Wireless attachments typically include "an antenna or antenna clusters, a communications cabinet at the base of a pole, coaxial cables connecting antennas to the cabinet, concrete pads to support the cabinet, ground wires and trenching, and wires for telephone and electric service." Gov't Pet. App. at 96a, 13 F.C.C.R. at 6799 ¶42.

[23] Certain fixed wireless companies, which operate by placing an antenna on a rooftop and running wires into buildings, have argued before the FCC in a separate proceeding that easements utility companies have to run their wires inside buildings are "rights-of-way" within the meaning of Section 224 and thus that fixed wireless carriers are entitled to access these in-building pathways for their own wires to connect to their customers. *See, e.g., In re Promotion of Competitive Networks in Local Telecommunications Markets*, 15 F.C.C.R. 22,983 (2000). *See also,*

When the original pole attachment legislation was being considered in the mid-1970's, both the Administration and Congress were concerned about delegating jurisdiction over electric companies to the FCC. Thomas J. Hauser, head of the White House Office of Telecommunications Policy, expressed this concern in 1976 in written comments to the Chairman of the House subcommittee considering the legislation. The number one item on Mr. Hauser's list of concerns about the proposed legislation was "the efficacy and propriety of delegating jurisdiction over electric companies and other noncommunications utilities to the Commission." H.R. Rep. No 94-1630, at 33-34 (Add. B at 60a). The following year, the new acting head of that office expressed similar concerns: "We do not believe the FCC should be delegated general jurisdiction over the facilities of electric companies and other noncommunications utilities." H.R. Rep. No. 95-721, pt. 2, at 12 (1977) (Add. C at 85a). On the floor of the Senate, the legislation's sponsor, Senator Ernest Hollings, echoed this concern when he introduced the Senate version of the legislation. 123 Cong. Rec. 14,974 (May 17, 1977) ("* * * we should examine the appropriateness of dele-gating to the FCC jurisdiction over nontelephone company practices not heretofore within the ambit of that agency's authority").

Congress responded to these concerns by making a very narrow grant of additional jurisdiction to the FCC, which is

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Comments of Winstar Communications, Inc., WT Docket No. 99-217 (filed Aug. 27, 1999); *Comments of Teligent, Inc.*, WT Docket No. 99-217 (filed Aug. 27, 1999). The wireless companies have also argued that a license a utility company may have to place an antenna on a rooftop is also a "right-of-way" thus permitting the wireless company to piggy-back its own antennas on this site under Section 224. The utility companies' position is that neither its in-building easements nor its rooftop licenses are "rights-of-way," and thus fixed wireless companies do not have mandatory access to these in-building pathways and rooftop sites under Section 224.

explained in considerable detail in the Senate Report which accompanied the legislation. S. Rep. No. 95-580, *reprinted in* 1978 U.S.C.C.A.N. 109 (Add. A at 1a). The Report explains that the FCC's new jurisdiction will apply only in the "communications space" on a pole, which is the space used for the attachment of wire communications:

> Federal involvement in pole attachments matters will occur only where space on a utility pole has been designated and is actually being used for communications services *by wire or cable*. Thus . . . if provision has been made for attachment of *wire communications* a communications nexus is established sufficient to justify, in a jurisdictional sense, the intervention of the Commission.
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> * * * *
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> This expansion of FCC regulatory authority is strictly circumscribed and extends only so far as is necessary to permit the Commission to involve itself in arrangements affecting the provision of utility pole communications space to CATV systems.

S. Rep. No. 95-580, at 15, *reprinted in* 1978 U.S.C.C.A.N at 123 (Add. A at 9a).

Congress implemented these jurisdictional limitations in three specific places in the statute. First, it defined a "utility" subject to the statute as "a person . . . who owns or controls poles, ducts, conduits or rights of way used, in whole or in part, *for wire communications*." 47 U.S.C. § 224(a)(1) (emphasis added). Second, it defined the "usable space" on a pole as the "the space above the minimum grade level which can be used for the attachment *of wires, cables, and associated equipment*." 47 U.S.C. § 224(d)(2) (emphasis added). Third, it established standards for the Commission's exercise of its authority to set rates for attachments by a

CATV system. 47 U.S.C. § 224(d)(1). The concept of "usable space" was built into this standard.[24]

An earlier version of the pole attachment legislation expressly called for regulation for "any attachment for wire communication" rather than the eventual "any attachment by a cable television system." H.R. Rep. No. 94-1630, at 2 (1976) (Add. B at 29a). This language was changed at the behest of the FCC, which wrote to Congress explaining that:

> under the proposed bill, the Commission might be involved in assuring just and reasonable rates for the use of poles by not only cable television system operators but also by many other users of wire communications. We understand that, in addition to cable systems, a large number of other entities utilize space on utility poles. These include public safety uses such as police, fire and traffic signaling, in addition to use by communications common carriers such as Western Union * * * It seems certain that the scope of a regulatory program designed to insure just and reasonable rates for the leasing of pole space by all these entities would be much larger than that necessary to insure just rates for cable systems. We would recommend therefore that if the legislative intent of this bill is merely to remedy pole attachment problems which are of importance to the cable industry, then its application should be so limited, preferably by inserting the term "cable television system" as defined by 47 C.F.R. § 76.5(a) in lieu of "wire communications."

[24] Section 224(d) provided: "For purposes of subsection (b) of this section, a rate is just and reasonable if assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total *usable space*, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit or right-of-way." 47 U.S.C. § 224(d) (emphasis added).

H.R. Rep. No. 94-1630, at 30-31 (Add. B at 53a-54a). It was thus clear that the original statute was intended to cover wireline attachments. Cable companies attach wireline facilities to utility poles.

The only pertinent change Congress made in 1996 was to add "telecommunications carriers" to Section 224. Congress did not change the statute's jurisdictional restriction to utilities which own or control poles "used, in whole or in part, for *wire communications*." 47 U.S.C. § 224(a)(1). Congress also did not change the definition of "usable space," which continues to mean "the space above the minimum grade level which can be used for the attachment of *wires, cables, and associated equipment*." 47 U.S.C. § 224(d)(2). More importantly, Congress incorporated the term "usable space" into the new formula established in Section 224(e) for attachments by "telecommunications carriers." 47 U.S.C. §§ 224(d) (2), (3). Wireless carriers are "telecommunications carriers;" if their attachments are covered at all, they must be covered under the 224(e) formula. But this formula is defined in terms of *wires, cables and associated equipment*. To read Section 224(e) as covering wireless equipment would read the Section 224(d)(2) definition of "usable space" out of the statute.[25] The language Congress used in Section 224(d)(2) and Section 224(e) could hardly be more plain. Telecommunications carriers, including wireless carriers, are entitled to a regulated rate for attachments of *wires, cables and associated equipment*. Wireless facilities are not covered.

This conclusion is buttressed in a number of significant ways. First, as the court of appeals noted, there is not a single

[25] Even the notion of the "space above the minimum grade" contained in the Section 224(d)(2)'s definition of usable space has no meaning in the case of wireless facilities, which typically include cables running down from the antenna or antenna cluster to a communications cabinet at the base of the pole, which itself sits on a concrete pad and is connected to a power source through ground wires buried in trenches.

mention of wireless telecommunications in Section 703 of the 1996 Act, which amended Section 224, or in its legislative history. Congress did, however, deal extensively with the siting of wireless equipment in the very next section of the 1996 Act, Section 704. Pub. L. No. 104-104, Title VII, at § 704(d), 110 Stat. 152 (codified at 47 U.S.C § 332) (Add. E at 93a-95a).[26] The siting of wireless equipment was a highly controversial subject in 1996, with the interests of wireless carriers clashing with the interests of local communities concerned about the placement, height, appearance, and potential negative health effects of wireless facilities.[27] In Section 704(a), which is entitled "National Wireless Telecommunications Siting Policy," Congress sought to reconcile these competing interests by guaranteeing that local authorities would retain ultimate control over decisions regarding the siting of wireless facilities while at the same time placing restrictions on their ability to deny applications for wireless siting authority.[28] Congress stated that nothing in the Act could "limit or affect the authority of the state or local government or instrumentality thereof over decisions

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[26] As the court of appeals noted, the wireless siting section of the Telecommunications Act of 1996 follows the pole attachment section; as codified, however, the two sections do not follow one another.

[27] For a comprehensive discussion of the many issues involved in wireless siting, *see* Kevin M. O'Neill, *Wireless Facilities Are A Towering Problem: How Can Local Zoning Boards Make The Call Without Violating Section 704 of the Telecommunications Act of 1996?*, 40 Wm. & Mary L. Rev. 975 (1999).

[28] Congressman Bliley, who chaired the House Commerce Committee that oversaw the passage of the Act, stated "nothing is in this Bill that prevents a locality . . . from determining where a cellular pole should be located . . . we do not allow a community to say that we are not going to have any cellular pole in our locality. That is wrong, nor are we going to say that they can delay these people forever. *But the location will be determined by the local governing body.*" 141 Cong. Rec. H8274 (Daily ed. Aug. 2, 1995) (Statement of Rep. Bliley) (emphasis added).

regarding the placement, construction, and modification of personal wireless service facilities." Telecommunications Act of 1996, Pub. L. No. 104-104, § 704 (codified at 47 U.S.C. § 332(c)(7)(A)(Supp. II 1996)) (Add. E at 93a).

Section 704(a) represents a careful balancing of the preservation of local zoning authority over the placement of wireless facilities and the federal interest in promoting the development of wireless services. Congress used Section 704 to impose several specific restrictions on local zoning boards considering applications for wireless facility placement. These include the requirement that the local zoning authorities (1) not discriminate among providers of functionally equivalent services, § 332(c)(7)(B)(i)(I); (2) not adopt rules that would have the effect of an outright prohibition on the provision of personal wireless services, § 332(c)(7)(B)(i)(II); (3) act on siting requests "within a reasonable amount of time;" and (4) issue decisions in writing supported by "substantial evidence contained in a written record," §§ 332(c)(7)(B)(ii) and (iii). Facility siting decisions can not be based on health and safety concerns so long as the wireless antennas otherwise meet the FCC's requirements in this area. § 332(c)(7)(B)(4). If a locality's actions violate Section 704, the legislation provides for accelerated judicial review within 30 days of the adverse action. § 332(c)(7)(B)(v).[29]

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[29] Congress dealt still further with wireless siting in Section 704(c), establishing a national policy of making Federal government property available for the placement of wireless telecommunications equipment. 47 U.S.C. § 332, statutory note. This subsection does not impose regulated rates for placement of wireless equipment on federal property; to the contrary, wireless sites are leased from the federal government at market rates. *See Facilitating Access to Federal Property for the Siting of Mobile Services, President's Memorandum on Mobile Service Antennas*, 31 Weekly Comp. Pres. Doc. 1424; 60 Fed. Reg. 42,023 (Aug. 10, 1995) (Presidential directive to make federal buildings available for siting wireless equipment); *see also, Placement of Commercial Antennas on*

As the court of appeals properly noted, Congress dealt comprehensively with the controversial issue of wireless siting in the "National Wireless Telecommunications Siting Policy" established in 47 U.S.C. § 332. The specificity with which Congress addressed wireless siting in Section 332 surely indicates it did not intend that Section 224 provide the FCC authority to regulate the siting of wireless equipment.

Even more fundamentally, the Pole Attachments Act is designed to deal with the potential exercise of monopoly power over bottleneck facilities. Utility poles are not, even potentially, bottleneck facilities for wireless equipment. Wireless equipment can be sited on virtually any tall building or structure, such as rooftops, communications towers, water towers, monopoles, billboards, highway light structures, church steeples, etc. Indeed, an entire commercial industry has emerged which is dedicated to siting wireless equipment. As the court of appeals stated, it is "beyond question * * * that utility poles are not bottleneck facilities for wireless systems." Gov't Pet. App. at 25a; 208 F.3d at 1275. Because they are not, the court of appeals properly held Section 224 does not cover wireless attachments.[30]

Federal Property, 61 Fed. Reg. 14,100 (Mar. 29, 1996) (General Services Administration guidelines), 64 Fed. Reg. 30,523 (May 28, 1999) (extending guidelines indefinitely); *Placement of Commercial Antennas on Federal Property*, 62 Fed. Reg. 32,611, 32,613 (June 6, 1997) (same) 64 Fed. Reg. 30,523 (May 28, 1999) (extending guidelines indefinitely); *Public Buildings and Space*, 63 Fed. Reg. 10,631 (Mar. 4, 1998) (same); *Pricing Policy for Occupancy of GSA Space*, 66 Fed. Reg. 23,169 (May 8, 2001) (interim rule).

[30] The claim of the Wireless *Amici* that there is no support in the record for the court's factual finding is untrue. On September 15, 1998, UTC, a trade association representing the telecommunications interests of utility companies, submitted comments in the FCC docket in the rulemaking below detailing at length the robust competitive market that exists for siting wireless equipment. United Telecom Council, Ex Parte Notice, CS Docket No. 97-151 (filed Sept. 15, 1998).

The Wireless *Amici* make three arguments against the factual conclusion that utility poles are not bottlenecks for wireless equipment. First, they argue that utility poles are bottleneck facilities because they are bottlenecks for the *wireline* segments of a wireless carrier's network. As discussed *supra*, this is a straw man argument, since utilities have always acknowledged that wireline facilities of a wireless carrier are covered by Section 224.[31] Second, the Wireless *Amici* argue that utility facilities are bottlenecks because fixed wireless carriers must place their antennas on the rooftops of buildings they service and run their wires through in-building pathways. Again, to the extent wireline facilities are involved, the utilities agree that Section 224 is theoretically applicable, although the utilities do not believe in-building pathways are covered by the Act. As to rooftops, control of antenna sites rests with the building owner, not the utility company; utilities can hardly be bottlenecks. Finally, the Wireless *Amici* spend several pages cataloging the fact that electric utility companies are in the business of providing wireless antenna sites on utility facilities. Br. at 16-17. Although the point the Wireless *Amici* purport to be making by this is obscure, the fact of the matter is that some (but by no means all) [32] electric utility companies are enthusiastically involved in the robust free market for wireless sites through the use of free-standing communications towers and transmission towers in their system.[33] Utility companies

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[31] This straw man argument is the *only* argument the Government makes as to why utility poles are allegedly not bottleneck facilities. Gov't Br. at 34-5.

[32] The Southern Companies do not currently market their transmission towers for any type of pole attachment.

[33] As the brief of *amici* Site Owners and Managers Alliance demonstrates, there is a vibrant free market for wireless sites. Indeed, even wireless carriers themselves have gone into the tower business. Sprint Communications has established a subsidiary specifically to exploit the free market for wireless sites. Sprint Sites USA, *About Us*, *at*

charge a market rate for these antenna sites, as do their competitors—tower companies, building owners, billboard owners, municipalities, etc. But the fact that wireless carriers *do* site antennas on utility facilities certainly does not make utility facilities bottlenecks.

Even if utility poles are not bottleneck facilities for wireless equipment, the Government argues that Section 224 does not use the term "bottleneck facility" or any cognate term, Gov't Br. at 34, and thus the statute applies by its terms to wireless equipment regardless of whether utility poles are bottlenecks for the attachment. The Government support this argument by citing to *Brogan v. United States*, 522 U.S. 398, 403 (1998) for the proposition that "it is not, and cannot be, [judicial] practice to restrict the unqualified language of the statute to the particular evil that Congress was trying to remedy." This argument is meritless, since the text of Section 224(d)(2) makes it clear that the statute *by its terms* applies to wires, cables and associated equipment. Moreover, even the most ardent textualist may wonder about the wisdom of interpreting a statute in a way that makes its central purpose—to address the potential exercise of monopoly power over bottleneck facilities—irrelevant. In any event, the issue is academic, since the statute is clear if one takes the trouble to read all of its terms. As on the cable Internet question, the Government and the Wireless *Amici* wish to

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http://www.sprintsites.com/about.html (last visited May 10, 2001) ("Sprint Sites USA was created to manage and operate Sprint's portfolio of more than 4,600 towers for the wireless communications industry."). Similarly, 360° Communications Company, which provides wireless voice and data services to 2.6 million customers, has leased its antenna sites to Omnipoint Communications, the second-largest publicly traded PCS company in the U.S. *360° Communications Signs Tower Collocation Agreement with Omnipoint Communications, available at* http//www.prnewswire.com/gh/cnoc/comp/ 111849.html (April 29, 1998). (360° Communications merged with Alltel Corp. in July 1998, *see* Alltel Corp., SEC Form 10-K 405 at 2 (filed Mar. 1, 2001)).

latch on to certain bits of the statute that support their position and to ignore the rest. From time immemorial, this has not been a permissible way to read a statute.

A vibrant free market exists for wireless sites, on towers, on monopoles, on rooftops, on billboards, on church steeples. The market rate for leasing wireless sites varies widely, but typically is $1,500 to $2,000 per month. A regulated pole attachment rate is about $6 per *year*. Congress ought not to be presumed to have taking the dramatic step of regulating the wireless siting market—or more precisely, a tiny segment of the wireless siting market—in Section 224 without saying a word, particularly given its comprehensive treatment of this highly controversial subject elsewhere in the 1996 Act. Section 224 does not reflect the kind of "textual commitment of authority" to the FCC to regulate wireless siting which this Court has held to be a necessary predicate to the exercise of agency power. *See Whitman v. American Trucking Ass'n, Inc.*, 121 S. Ct. 903, 910 (2001) ("Congress * * * does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions"); *see also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) ("we are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion"); *MCI Telecomm. Corp. v. American Tel. & Tel. Co.* 512 U.S. 218, 231 (1994)("it is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion—and even more unlikely that it would achieve that through such a subtle device").

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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June 5, 2001

ADDENDA

ADDENDUM A

SENATE REPORT NO. 95-580

[page 1]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (S. 1547) to amend the Communications Act of 1934, as amended, with respect to penalties and forfeitures, and to authorize the Federal Communications Commission to regulate pole attachments, and for other purposes, having considered the same, reports favorably thereon with amendments and recommends that the bill as amended do pass.

SUMMARY AND PURPOSE

The bill (S. 1547) serves two purposes:

(1) To unify, simplify, and enlarge the scope of the forfeiture provisions of the Communications Act of 1934; and

(2) To establish jurisdiction within the Federal Communications Commission (FCC) to regulate the provision by utilities to cable television systems of space on utility poles, ducts, conduits, or other rights-of-way owned or controlled by those utilities.

PENALTIES AND FORFEITURES

S. 1547, as reported, would unify and simplify the forfeiture provisions in the Communications Act of 1934, enlarge their scope to cover all persons subject to the act, provide more practical limitations periods and more effective deterrent levels of forfeiture authority, and would generally afford the Federal Communications Commission greater flexibility in the enforcement of the Communications Act and rules and regulations promulgated thereunder.

[page 2]

The Communications Act of 19334 now imposes monetary civil penalties on certain individuals who fail to comply with the Communications Act, FCC regulations, or related matters. These civil liabilities include the forfeiture provisions in section 503 (b) (relating to the broadcast services) and section 510 (applicable to nonbroadcast radio stations). S. 1547 would enlarge the scope of forfeiture liability under these sections to cover other persons subject to the Communications Act—such as cable television systems, users of experimental or medical equipment emitting electromagnetic radiation, persons operating without a valid radio station or operator's license, and some communications equipment manufacturers.

S. 1547, as reported, would make three alterations in the existing forfeiture provisions. First, it would extend the limitations period within which notices of liability must be issued: for persons not previously subject to forfeiture liability, 1 year; for nonbroadcast licensees, from the present 90 days to 1 year; and for broadcast licensees, from the present 1 year to 1 year or the current license term, whichever is longer, not to exceed 3 years. Second, the maximum forfeiture that could be imposed for a single violation would be raised to $2,000; for multiple violations, within any single notice of liability, $20,000 for a common carrier, broadcast licensee, or cable system operator, and $5,000 in the case of all other persons. Third, the bill would authorize the Commission to mitigate or remit common carrier forfeitures in the same way as it now may with respect to all other forfeitures. Furthermore, the Commission would be given its choice of using the traditional "show cause" procedure for imposing a forfeiture or alternatively holding an adjudicatory hearing under section 554 of the Administrative Procedure Act.

POLE ATTACHMENT REGULATION

S. 1547, as reported, would empower the Commission to hear and resolve complaints regarding the arrangements between cable television systems and the owners or controllers of utility poles. A pole attachment, for purposes of this bill, is the occupation of space on a utility pole by the distribution facilities of a cable television system—coaxial cable and associated equipment—under contractual arrangements whereby a CATV system rents available space for an annual or other periodic fee from the owner or controller of the pole—usually a telephone or electric power company. The Commission would prescribe regulations to provide that the rates, terms, and conditions for pole attachments are just and reasonable. For a period of 5 years after enactment of this act, the Commission would employ a specified rate-setting formula in determining whether a particular pole attachment rate is just and reasonable. The formula describes a range between marginal and a proportionate share of fully allocated costs within which pole rates are to fall.

Any State which chooses to regulate pole attachments may do so at any time, and will preempt the Commission's involvement in pole attachment arrangements in that State simply by notifying the FCC that it regulates the rates, terms, and conditions for such attachments. S. 1547 in no way limits or restricts the powers of the several States to regulate pole attachments.

[page 3]

The jurisdictional restrictions of section 2(b) of the act (47 U.S.C. 152(b)) are modified to permit the FCC to regulate practices of intrastate communications common carriers as they relate to pole attachments. Utilities owned by the several States or their political subdivisions, and utilities owned by the Federal Government, are exempt from FCC, pole attachment regulation. In like manner, the provisions of S. 1547 do not apply to any cooperative electric or telephone utility, or any railroad.

BACKGROUND AND NEED

S. 1547 was introduced by Senator Hollings on May 17, 1977. The committee held hearings on the bill on June 23 and 24, 1977. Additional written submissions were received from interested parties, who expressed their views on the bill in its form as introduced, on a study of pole attachment problems of the Commission's Office of Plans and Policy, and on alternative pole attachment legislation suggested by the FCC's Common Carrier Bureau. That portion of S. 1547 relating to forfeiture authority is identical to S. 2343, which the Senate passed in June 1976 during the 94th Congress.

* * *

POLE ATTACHMENT REGULATION

It is the general practice of the cable television (CATV) industry in the construction and maintenance of a cable system to lease space on existing utility poles for the attachment of cable distribution facilities (coaxial cable and associated equipment). These leasing agreements typically involve the rental of a portion of the communications space on a pole for an annual or other periodic fee as well as reimbursement to the utility for all costs associated with preparing the pole for the CATV attachment. The FCC estimates that there are currently over 7,800 CATV pole attachment agreements in effect. Approximately 95 percent of all CATV cables are strung above ground on utility poles, the remainder being placed under-ground in ducts, conduits, or trenches. These poles, ducts, and conduits are usually owned by telephone and electric power utility companies, which often have entered into joint use or joint ownership agreements for the use of each other's poles. It is estimated that approximately 70 percent of all utility poles owned by either telephone or electric utilities are actually jointly used. These joint utility agreements commonly reserve a portion of each

pole for the use of communications services (telephone, telegraph, CATV, traffic signaling, municipal fire and police alarm systems, et cetera). This communications pole space is usually under the control of the telephone company.

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Owing to a variety of factors, including environmental or zoning restrictions and the costs of erecting separate CATV poles or entrenching CATV cables underground, there is often no practical alternative to a CATV system operator except to utilize available space on existing poles. The number of poles owned or controlled by cable companies is insignificant, estimated to be less than 10,000, as compared to the over 10 million utility-owned or controlled poles to which CATV lines are attached.

Sharing arrangements minimize unnecessary and costly duplication of plant for all pole users, utilities as well as cable companies. Nevertheless, pole attachment agreements between utilities which own and maintain pole lines, and cable television systems which lease available space have generated considerable debate. Conflict arises, understandably, from efforts by each type of firm to minimize its share of the total fixed costs of jointly used facilities. Of the more than 10 million poles on which cable operators lease space, fewer than half are controlled by telephone companies, while 53 percent are controlled by power utilities, public and private. Most CATV systems lease space from more than one utility. An estimated 72 percent of all cable systems lease pole space from Bell Telephone operating companies, approximately 65 percent have agreements with investor-owned power companies, an additional 21 percent lease space from independent telephone companies, while 10 percent attach to poles owned by REA cooperatives and 14 percent acquire space from utilities owned by municipalities.

Due to the local monpoly in ownership or control of poles to which cable system operators, out of necessity or business

convenience, must attach their distribution facilities, it is contended that the utilities enjoy a superior bargaining position over CATV systems in negotiating the rates, terms and conditions for pole attachments. It has been alleged by representatives of the cable television industry that some utilities have abused their superior bargaining position by demanding exorbitant rental fees and other unfair terms in return for the right to lease pole space. Cable operators, it is claimed, are compelled to concede to these demands under duress. The Commission's Office of Plans and Policy, in a staff report released in August 1977, concluded that, "[a]lthough the reasonableness of current pole attachment rates remains open to question, public utilities by virtue of their size and exclusive control over access to pole lines, are unquestionably in a position to extract monopoly rents from cable TV systems in the form of unreasonably high pole attachment rates" (page 34).

The committee received testimony that the introduction of broadband cable services may pose a competitive threat to telephone companies, and that the pole attachment practices of telephone companies could, if unchecked, present realistic dangers of competitive restraint in the future. The Commission has investigated the competitive inter-relationships of telephone and cable companies in various proceedings and contexts, and has taken action to curtail potential anticompetitive practices in several instances. (See for example, *Common Carrier Tariffs for CATV Systems, 4* FCC 2d 257 (1966); *General Telephone Co. of California,* 13 FCC 2d 448, *af d.* 413 F. 2d 390 D.C. Cir. *cert. denied,* 396 U.S. 888 (1969). *See also, General Telephone Co. of the Southwest* v. *United States, 449* F. 2d 846, 857 (5th cir. 1971).)

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The pole attachment policies and practices of utilities owning or controlling poles are generally unregulated at the present time. Currently only one State—Connecticut—

actually regulates pole attachment arrangements, while in another eight States, regulatory authority apparently exists but has *not* been exercised—California, Hawaii, Nevada, Alaska, Rhode Island, Vermont, New Jersey, and New York. According to a recent survey conducted by the Commission's Cable Television Bureau, entitled "Cable Television Pole Attachment—State Law and Court Cases," very few States have specific statutory provisions governing attachments to utility poles. Only 15 States, including the District of Columbia, appear to have enacted statutory authority which may be of sufficient breadth to permit regulation by an appropriate State body.

JURISDICTIONAL BASIS FOR FCC REGULATION

Moreover, the Federal Communications Commission has recently decided that it has no jurisdiction under the Communications Act of 1934, as amended, to regulate pole attachment and conduit rental arrangements between CATV systems and nontelephone or telephone utilities. *(California Water and Telephone Co., et al,* 40 R.R. 2d 419 (1977).) This decision was the result of over 10 years of proceedings in which the Commission examined the extent and nature of its jurisdiction over CATV pole attachments. The Commission's decision noted that, while the Communications Act conferred upon it expansive powers to regulate all forms of electrical communication, whether by telephone, telegraph, cable or radio, CATV pole attachment arrangements do not constitute "communication by wire or radio," and are thus beyond the scope of FCC authority. The Commission reasoned:

> The fact that cable operators have found in-place facilities convenient or even necessary for their businesses is not sufficient basis for finding that the leasing of those facilities is wire or radio communications. If such were the case, we might be called upon to regulate access and charges for use of public and private roads and right of ways essential for the laying of wire, or even access and rents for antenna sites.

In addition the Commission concluded that there was no reason to separate resolution of the purely legal question of jurisdiction on the basis of whether the party owning or controlling the pole was a telephone or nontelephone company.

The committee believes that S. 1547, as reported, will resolve this jurisdictional impasse, by creating within the FCC an administrative forum for the resolution of CATV pole attachments disputes and by prompting the several States, should they wish to involve themselves in these matters, to develop their own plans free of Federal prescriptions.

The committee believes that Federal involvement in pole attachment arrangements should, serve two specific, interrelated purposes: To establish a mechanism whereby unfair pole attachment practices may come under review and sanction, and to minimize the effect of unjust or unreasonable pole attachment practices on the wider development of cable television service to the public.

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The basic design of S. 1547, as reported, is to empower the Federal Communications Commission to exercise regulatory oversight over the arrangements between utilities and CATV systems in any case where the parties themselves are unable to reach a mutually satisfactory arrangement and where a State or more local regulatory forum is unavailable for resolution of disputes between these parties. S. 1547, as reported, accomplishes this design in the most direct and least intrusive manner. Federal involvement in pole attachments matters will occur only where space on a utility pole has been designated and is actually being used for communications services by wire or cable. Thus, regardless of whether the owner or controller of the pole is an entity engaging in the provision of communications service by wire, if provision has

been made for attachment of wire communications a communications nexus is established sufficient to justify, in a jurisdictional sense, the intervention of the Commission. The underlying concept of S. 1547, as reported, is to assure that the communications space on utility poles, created as a result of private agreement between nontelephone companies and telephone companies, or between nontelephone companies and cable television companies, be made available, at just and reasonable rates, and under just and reasonable terms and conditions, to CATV systems.

S. 1547, as reported, stops short of declaring the provision of pole space to CATV "wire or radio communications" per se, or that poles constitute "instrumentalities, facilities. apparatus," *et cetera* incidental to wire communications (as used in section 3(a) of the Communications Act, 47 U.S.C. 153 (a)). However, S. 1547, as reported, does expand the Commission's authority over entities not otherwise subject to FCC jurisdiction (such as electric power companies) and over practices of communications common carriers not otherwise subject to FCC regulation (principally the intrastate practices of interstate or intrastate telephone companies). This expansion of FCC regulatory authority is strictly circumscribed and extends only so far as is necessary to permit the Commission to involve itself in arrangements affecting the provision of utility pole communications space to CATV systems. Even in this instance S. 1547, as reported, does not contemplate a continuing direct involvement by the Commission in all CATV pole attachment arrangements. FCC regulation will occur only when a utility or CATV system invokes the powers conferred by S. 1547, as reported, to hear and resolve complaints relating to the rates, terms, and conditions of pole attachments. The Commission is not empowered to prescribe rates, terms, and conditions for CATV pole attachments generally. It may, however, issue guidelines to be used in determining whether the rates, terms, and conditions for

CATV pole attachments are just and reasonable in any particular case.

Moreover, the Commission's jurisdictional reach extends only to those entities which participate in the provision of communications space on utility poles. Thus, an electric power company which owns or controls a utility pole would be subject to FCC jurisdiction only if two preconditions are met: (1) the power company shares its pole with a telephone company, or other communications entity; and (2) a cable television system shares the communications space on the pole with the telephone utility or other communications entity, or occupies the communications space alone. An electric power company owning or

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controlling a pole on which no communications space has been designated would not be subject to FCC jurisdiction. S. 1547, as reported, does not vest within a CATV system operator a right to access to a utility pole, nor does the bill, as reported, require a power company to dedicate a portion of its pole plant to communications use.

It has been made clear in testimony by CATV industry representatives to this committee that access to utility poles does not in itself constitute a problem, among other reasons because CATV offers an income-producing use of an otherwise unproductive and often surplus portion of plant. CATV industry representatives estimate that about 15 percent of all utility poles owned or controlled by electric power companies are not occupied by telephone companies as well, and that CATV systems are already attached to a high percentage of these power poles in communities served by cable television.

While S. 1547, as reported, does not legislate a guarantee of access by CATV systems to utility poles, the committee recognizes that it is conceivable that a nontelephone utility

which currently provides CATV pole attachment space might discontinue such provision simply in order to avoid FCC regulation. The committee believes that under S. 1547, as reported, the Commission could determine that such conduct would constitute an unjust or unreasonable practice and take appropriate action upon a finding that CATV pole attachment rights were discontinued solely to avoid jurisdiction.

Furthermore, S. 1547, as reported, would not require the Commission, as it stated in its *California Water and Telephone Co.*, decision, noted above, "to regulate access and charges for use of public and private roads and right-of-ways essential for the laying of wire, or even access and rents for antenna sites." The communications space must already have been established, meaning that FCC jurisdiction arises only where a pole, duct, conduit, or right-of-way has already been devoted to communications use, and the communications space must already be occupied by a cable television system. Hence any problems pertaining to restrictive easements of utility poles and wires over private property, exercise of rights of eminent domain, assignability of easements or other acquisitions of right-of-way are beyond the scope of FCC CATV pole attachment jurisdiction. Any acquisition of any right-of-way needed by a cable company is the direct responsibility of that company, in accordance with local laws. S. 1547, as reported, is not intended to disturb such matters in any way.

STATE OR LOCAL CATV POLE ATTACHMENT REGULATION

S. 1547, as reported, permits any State which regulates the rates, terms, and conditions for CATV pole attachments to preempt the Federal Communications Commission's regulation of pole attachments in that State. The committee considers the matter of CATV pole attachments to be essentially local in nature, and that the various State and local regulatory bodies which regulate other practices of telephone and electric utilities are better equipped to regulate CATV

pole attachments. Regulation should be vested with those persons or agencies most familiar with the local environment within which utilities and cable television systems operate. It is only because such State

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or local regulation currently does not widely exist that Federal supplemental regulation is justified.

However, the framework for such State and local regulation is already in place. CATV systems and electric power and telephone utilities are subject, in varying degrees, to local or State regulation in numerous ways. State and local public service commissions and other agencies already possess a wealth of experience in regulating intrastate power and telephone companies. CATV systems are granted franchise permits from the officials in the communities in which they operate. Several States have cable television commissions which perform regulatory functions in addition to those performed by the community franchising authorities.

Nevertheless, in the absence of regulation by these State and local authorities of CATV pole attachments, the Federal Communications Commission should fill the regulatory vacuum to assure that rates, terms, and conditions otherwise free of governmental scrutiny are assessed on a just and reasonable basis. The committee looks to a replacement of interim FCC jurisdiction by the States and localities concerned with the orderly growth of cable television. Since this is a relatively novel issue in many States, there will be a time before many assert CATV pole attachment jurisdiction. Most States will require special legislation in order to empower their utility commissions with the requisite authority. Some States may wish to conduct studies of local needs prior to considering legislative action. There is, too, the possibility that some States may not choose to regulate in this area.

S. 1547, as reported, establishes a simple notification process whereby a State may recapture CATV pole attachment jurisdiction by certifying to the Commission that it regulates the rates, terms, and conditions for CATV pole attachments. The bill as reported makes clear that the Commission shall be foreclosed from regulation with respect to pole attachments in any State which has so certified to the Commission. Receipt of such a certification from the State shall be conclusive upon the Commission. The FCC shall defer to any State regulatory program operating under color of State law, even if debate or litigation at the State level is in progress as to the authority of the State or local body to carry out a CATV pole attachment regulatory program. However, since the purpose of the bill as reported is to create a forum that is, in fact, available to adjudicate pole attachment disputes, State preemption of FCC jurisdiction would not occur if a State only had authority to regulate in this area but was not actually implementing that authority. Thus, if a State is regulating, or is prepared to regulate upon a proper request, the FCC is preempted. Litigation challenging the State's authority would not affect that preemption unless the reviewing court or other authority had imposed a stay of State regulation pending outcome of the litigation.

S. 1547, as reported, unlike the bill as introduced, imposes no rate-setting formula upon the States. The committee believes that the States should have maximum flexibility to develop a regulatory response to pole attachment problems in accordance with perceived State or local needs and priorities. The committee is of the opinion that no Federal formula could accommodate all the various local needs and priorities

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in an entirely satisfactory manner. As noted above, the committee believes that familiarity with the specific operating environment of the utilities and cable television systems within a State, as well as the needs and interests of State or

local constituents, is indispensable to efficient and equitable regulation.

Furthermore, imposition of a Federal ratesetting formula on the States would discourage State regulation by leaving only ministerial functions to the State public utility commissions or other regulatory agencies of the States or localities. The committee wishes to facilitate the replacement of FCC regulation in this area, not to vest within the Commission permanent nationwide pole attachment duties.

Ultimately, CATY pole attachment ratesetting involves equity considerations. Decisions regarding the allocation of pole costs among users should reflect in some rough sense the ability of cable subscribers and the utilities' customers to pay for costs which are passed along to them. Another significant equity consideration is the relative importance of each of the respective services to the communities served. Considerations of equity should turn on the needs and interests of local constituents. Given the fact that State public service commissions or local regulatory bodies are better attuned to these needs and interests than a Federal agency, jurisdiction over CATV pole attachments should rest with non-Federal officials.

Because the pole rates charged by municipally owned and cooperative utilities are already subject to a decisionmaking process based upon constituent needs and interests, S. 1547, as reported, exempts these utilities from FCC regulation. Presently cooperative utilities charge the lowest pole rates to CATV pole users. CATV industry representatives indicate only a few instances where municipally owned utilities are charging unsatisfactorily high pole rental fees. These rates presumably reflect what local authorities and managers of customer-owned cooperatives regard as equitable distribution of pole costs between utilities and cable television systems.

As to municipally owned utilities, in many cases the same local entity—the city council—is responsible finally for

granting CATV franchises, and setting pole rates and electric and CATV subscriber rates. There are today approximately 2,228 local jurisdictions owning local public power systems. Of these, about 2,112 have the authority to grant CATV franchises as well, and about half or 1,008 of these municipal power systems have granted cable franchises. Thus these localities are in the best position to determine the respective responsibilities of pole users for the costs of erecting and maintaining these facilities.

Cooperatively owned utilities, by and large, are located in rural areas where often over-the-air television service is poor. Thus the customers of these utilities have an added incentive to foster the growth of cable television in their areas. Many stockholders of power or electric cooperatives also subscribe to cable television systems. Moreover, the Rural Electrification Administration of the Department of Agriculture advises this committee that over 60 percent of existing REA loan recipient plant is buried underground, mostly in trenches, and that approximately 95 percent of all new plant is being buried under-ground. Therefore, as to most cooperative utilities, CATV pole attachment arrangements are unnecessary since there are no leasing agreements associated with use of trenches.

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Railroads likewise play an insignificant role in CATV pole attachment matters and are also exempt from FCC regulation under S. 1547, as reported. It is not the committee's intention that S. 1547, as reported, should affect in any way existing circumstances regarding CATV pole attachments on Indian lands.

FCC INTERIM RATE-SETTING FORMULA

S. 1547, as reported, sets forth a rate-setting formula to be employed by the Commission in determining whether the rates for CATV pole attachments in any particular case are just and reasonable. The formula describes a range of

permissible rates between "additional costs" and a proportionate share of the "operating expenses and actual capital costs" of the utility pole. In essence, the standard permits the contracting parties, or the Commission, to deter mine a CATV pole attachment, rate somewhere between avoidable costs and fully allocated costs.

The level of pole attachment fees is intimate1y connected with the terms and conditions of pole space leasing agreements. The reasonableness of a utility's pole attachment practices must be judged with reference to the compensation that it receives from cable companies for the service provided. For example, a pole attachment fee designed to recover all of the utility's fully allocated costs might justify giving cable operators all of the rights with respect to poles as other utility users, subject only to the higher priority that exists for the maintenance of telephone and electric service. Alternatively, a fee designed to recover only the utility's avoidable costs, which could be expected to be minimal since most of those costs are the outlays that should be fully recovered in the make-ready charges, would justify treating cable as a clearly secondary use subordinate in every respect to the provision of electric and telephone service. This interim formula reflects a belief that the annual pole attachment fee should be set somewhere between avoidable and fully allocated costs in order to avoid inhibiting the growth of cable television and to insure that cable operators and their subscribers make some equitable contribution to the fixed costs of the utility systems they use.

The term "additional costs" means those costs which would not be incurred by the pole owner or controller "but for" the CATV attachment. Within this category would fall such items as preconstruction survey costs and engineering, make-ready, and change-out costs 'ncurred in preparing the utility pole for the CATV attachmer .. Make-ready costs are those necessary to rearrange existing telephone and power lines to maintain

clearances between different pole lines required by individual utility construction and safety standards and national electrical safety codes and to reinforce poles when necessary to increase load capacity. In a few limited instances it may be necessary for the utility to replace an existing pole with a larger facility in order to accommodate the CATV user. In those cases it would be appropriate to charge the CATV user a certain percentage of these pole "change-out" replacement costs, sometimes referred to as the "nonbetterment costs." All of these costs arise solely by virtue of the CATV occupation of space within the commnications space on the pole.

The term "operating expenses and actual capital costs of the utility," as used in S. 1547, as reported, refers to the costs to the utilities, irre-

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spective of the CATV attachment, of owning and maintaining poles. Such costs include interest on debt, return on equity (profit) depreciation, taxes, administrative and maintenance expenses. There will remain some dispute, it is anticipated, as to whether a particular capital or expense item is "attributable" to the pole or whether a determination of rates based on future as opposed to embedded costs is appropriate. For example, maintenance expenses of utility pole crews may be difficult to assign where the same crew performs functions other than maintaining utility poles. Likewise, general office salaries and expenses may not be susceptible to clear attribution to pole maintenance categories. Further, there may be some difficulty in determining the components of "actual" capital costs. As to some of these factors the committee expects that the Commission will have to make its best estimate of some of the less readily identifiable actual capital costs. Special accounting measures or studies should not be necessary.

The committee is advised that the majority of cost and expense items attributable to utility pole plant are already

established and that publicly available accounts reflecting total annual pole costs are filed by utilities with the various regulatory agencies with ratemaking jurisdiction over their activities. Since the rate-setting formula set forth in S. 1541, as reported, merely establishes a methodology for assigning pole costs, however determined, under applicable accounting procedures, the committee sees no need for the Commission to establish a separate system of accounting to determine operating expenses and capital costs attributable to poles, or to reexamine on its own initiative, the reasonableness of the cost methodology made by the utilities and sanctioned by State or local regulatory agencies.

Once these expense items and capital costs are determined, the formula provides a method for determining a maximum portion of these total pole costs which may be assigned to the CATV system. The allocation formula provides that a cable system may bear a proportionate share of the total pole costs in exactly the same proportion that its attachment and attendant clearances take up usable space. By way of example, on a typical utility pole 35 feet in length there are 11 feet of usable space (that space above minimum grade level clearance used to attach cable, telephone, and electric wires and associated equipment). By what is virtually a uniform practice throughout the United States, cable television is assigned 1 foot out of the 11 feet of usable space. (While cable only physically occupies approximately 1 inch of this space, the clearance space between CATV and the next adjacent pole user is attributed to CATV.) Cable's share of the total capital costs and operating expenses for the entire 35-foot pole would be one-eleventh. Cable would pay its share of not just the costs of the 11 feet of usable space but of the total costs of the entire pole including the unusable portion (below grade level, and between grade and minimum clearance levels). This allocation formula reflects the concept of relative use of the entire facility. To the extent that a pole is used for a particular service in greater proportion than it is

used for another service, the relative costs of that pole are reflected proportionately in the costs of furnishing the service which has the greater amount of use.

In regard to the rate-setting formula set forth in S. 1547, as reported, the committee wishes to make one point very clear. The particular

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methodology selected in this bill is only one of many plausible approaches to assigning pole costs to a CATV system, and should not be considered to reflect the committee's judgment that allocation of pole costs according to relative use is the optimal methodology. The committee's decision to incorporate a specific rate-setting formula in S. 1547, as reported, is based entirely on the following considerations: To assist the Federal Communications Commission during the first few years of regulation in this new area; and to provide the Commission with a sense of congressional intent as to the meaning of the term "just and reasonable rate," so as to avoid lengthy initial proceedings at the Commission to determine what just and reasonable CATV pole attachment rates should be. The rate-setting formula of S. 1547, as reported, should be regarded as an interim measure only, having no precedential effect whatsoever on other rate-setting responsibilities of the Commission. Nor should this interim formula be deemed to reflect the committee's preference that the Commission indefinitely employ this particular methodology or the underlying concept of relative use in the instant case of CATV pole attachments. A 5-year termination of this formula is imposed to afford the Commission greater leeway to select a more appropriate methodology should experience and changed conditions so dictate. After this 5-year period the Commission would be guided by the "just and reasonable" statutory standard.

The bill as reported sets forth no specific guidelines to the Commission to determine whether any term or condition for

CATV pole attachments is just and reasonable. Such terms and conditions usually include matters relating to inspections, extent and duration of license, liability for a portion of future capital costs, insurance, surety bonds, lease revocation and like matters. The committee believes that the open standard of "just and reasonable" is at the same time sufficiently precise and flexible to permit the Commission to make determinations when presented with specific contractual provisions alleged to be excessively onerous or unfair. In any event, the fairness of any term or condition of a CATV pole-leasing agreement. will have to be judged in relation to other contract provisions, prevailing practices in the industries involved, and the particular pole rate charges, matters which cannot be precisely translated into statutory language.

FCC CATV POLE ATTACHMENT REGULATORY PROCEDURES

The committee desires that the Commission institute a simple and expeditious CATV pole attachment program which will necessitate a minimum of staff, paperwork and procedures consistent with fair and efficient regulation.

Since S. 1547, as reported, does not define the provision of pole attachments as a common carrier service, the full panoply of regulatory procedures and enforcement mechanisms provided in title II of the Communications Act of 1934 as reported would not automatically extend to utilities subject to FCC pole attachment regulation. The bill as reported affords the Commission discretion to select the regulatory tools necessary to carry out its new responsibilities consistent with the simple complaint procedure specified in the bill as reported, S. 1547, as reported charges the Commission to develop after an appropriate

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rulemaking proceeding, a flexible program to adjudicate complaints relating to CATV pole attachment rates, terms, or conditions. The Commission's adjudicatory authority would

not come into play until a complaining party has brought a matter to the Commission's attention. After hearing the complaint and responsive pleadings, if the Commission determines that a particular rate, term, or condition is unjust or unreasonable, it shall take any action it deems appropriate and necessary, including ordering the parties to undertake further negotiations to arrive at a just and reasonable settlement of the dispute to their mutual satisfaction. Alternatively, the Commission may order a party to show cause why it should not cease and desist from practices found to he unjust or unreasonable.

The Commission may by rulemaking establish regulations governing the form and content of complaints relating to CATV pole attachments, including requirements that the complaining party establish prima facie the unjustness or unreasonableness of any rate, term, or condition and show that the parties involved are unable to resolve the matter themselves and that all available State or local administrative remedies have been exhausted. To assist parties in their private resolution of CATV pole attachment disputes, the Commission may publish guidelines to be used in determining whether a particular rate, term, or condition would be just and reasonable.

The Commission may also prescribe such rules as it deems appropriate relating to the conduct of the complaint procedure established by the bill as reported. Such rules may include such matters as assignment of the burden of proof on contested rates, terms, and conditions, or on such documentation offered by a utility to justify any rate, term, or condition under challenge.

In determining the lawfulness of a utility's rates, terms, and conditions for CATV pole attachments, the Commission may accept in whole or in part the depreciation rates, property valuations, systems of accounts, rates of return and the like established or determined by any State or local agency or any

agency of the Federal Government. It is not the intent of S. 1547, as reported, to require the Commission to embark upon a large-scale ratemaking proceeding in each case brought before it, or by general order. It would be extremely difficult for the Commission to attempt such a task. The annual charges for poles vary from one region of the country to another, from one company to another within a region, and within one company by reason of particular historical patterns of development, acquisition, accounting and construction practices, and the varying terms of joint user agreements with other utilities. Any general ratemaking principles which did not take into account such factors would be inherently inefficient, as well as unfair. Rather, the FCC is to focus more narrowly on the just and reasonable assignment of utility pole costs to the CATV user. Among those costs are the utility's rate of return and other capital cost factors, which will already have been established by a State or local agency. There is no need for the Commission to make independent determinations as to each element of a utility's annual pole costs, as S. 1547, as reported, merely requires the Commission to follow, for an interim period of 5 years, a method for assigning pole costs, however determined under applicable accounting procedures.

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SECTION-BY-SECTION ANALYSIS

Section 1

This section sets forth the short title of the bill—the "Communications Act Amendments of 1977".

* * *

Section 5.

This section modifies existing section 2(b) of the Communications Act of 1934 (47 U.S.C. 152(b)) which limits the jurisdiction of the Commission over connecting carriers to

sections 201 through 205 of title II of the act. Since section 6 of S. 1547, as reported, would give the Commission CATV pole attachment regulatory authority over connecting communications common carriers otherwise exempt from the provisions of the 1934 act as noted above, a conflict arises between the limitation on the Commission's jurisdiction of section 2(b) and its duty to regulate under proposed new section 224, set forth in section 6 of S. 1547, as reported. Section 5 of S. 1547, as reported, removes this conflict by removing the jurisdictional limitations of section 2(b) as they would otherwise apply to proposed section 224.

Section 6.

This section adds a new section 224 to title II of the Communications Act of 1934, as amended, relating to regulation by the Commission of the provision of pole attachment space to cable television systems by owners and controllers of utility poles. Subsection (a) of proposed section 224 sets forth definitions of terms used in the succeeding subsections. The term "utility" is defined to include entities such as electric power and telephone companies whose rates or charges are regulated by Federal, State, or local bodies. If such a utility owns or controls utility poles used for wire communication, it is subject to the jurisdiction of the FCC for purposes of section 224. "Wire communication" is defined in section 3 (a) of the 1934 act (47 U.S.C. 153(a)). Certain of such utilities are exempted from the provisions of section 224 : Railroads, municipally owned power systems, electric and telephone cooperative companies, and like entities owned by the Federal Government, any State, or any political subdivision, agency or instrumentality of any State. The term "pole attachment" is defined to mean the attachment of the cables of a CATV system to a pole or occupation of a duct or conduit, or other right-of-way owned or controlled by a utility. Duct or conduit systems consist of underground reinforced passages for electric and communications facilities

as well as underground dips, lateral members, hand holes, splicing boxes, or pull boxes.

Subsection (b) of this section directs the Commission to regulate the rates, terms, and conditions whereby CATV systems attach their cable distribution facilities to poles owned or controlled by utilities. The Commission regulations shall provide that such matters are just and reasonable to all pole users. Subsection (b) also directs the Commission to adopt rules and regulations to implement its regulatory authority within 180 days from the date of enactment. This subsection requires the Commission to adopt procedures to adjudicate complaints relating to CATV pole attachments and directs the Commission to take appropriate action upon a finding that a particular rate, term, or condition for pole attachments is unjust or unreasonable. Among other ac-

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tions the Commission may order a party violating the provisions of this section to cease and desist from further violation, pursuant to existing cease and desist provisions of the Communications Act of 1934, as amended.

Subsection (c) of this section restricts the jurisdictional reach of the Commission's pole attachment authority. The Commission shall have no such authority in any State which regulates the rates, terms, and conditions for pole attachments. A State may recapture pole attachment jurisdiction at any time simply by notifying the Commission that it regulates the matters encompassed by this section. Such notification would have the effect of automatically preempting the Commission's authority as to CATV pole attachments in that State.

Subsection (d) of this section defines the term "just and reasonable rate" by describing a range within which a reasonable and just CATV pole attachment rate must fall. The lower end of this range would be a rate which reimburses the

utility for its costs borne to accommodate the CATV pole attachment, costs which it would not have incurred but for the presence of CATV cable on its poles. The upper end of this range is expressed in terms of a charge to the CATV pole user which reflects its proportionate share of the total costs of the pole, such total costs being the recurring operating expenses and capital costs attributable to the utility pole. Cable's proportionate share would be calculated by determining the percentage of usable space used by the CATV system (*i.e.* the actual physical attachment plus clearance space between the CATV attachment and adjacent attachments) and multiplying that percentage by the total of the capital costs and operating expenses of the entire pole.

Subsection (e) of this section limits the effectiveness of the rate-setting formula set forth in subsection (d) to 5 years. Thereafter the Commission shall be guided by the "just and reasonable" standard set forth in subsection (b) of this section.

Section 7.

This section provides that these amendments shall take effect 30 days after the date of enactment. Any act or omission which occurs prior to the effective date of this act shall continue to be subject to forfeiture under the provisions of section 503 (b) and 510 as then in effect.

REGULATORY IMPACT STATEMENT

S. 1547, as reported, would expand the scope of the Commission's regulation in several significant respects. As to that portion of the bill relating to forfeitures, the Commission's authority to fine persons or businesses found to violate the provisions of the Communications Act of 1934, Commission rules, and related matters, would extend to entities not previously subject to such forfeiture authority. The Commission already exercises regulatory oversight of the activities of most of these entities. S. 1547, as reported,

provides the Commission with an additional enforcement mechanism to assure compliance by these entities with existing rules and regulations applicable to their communications-related activities.

As to the pole attachment regulation sections of S. 1547, as reported, the Commission would be granted regulatory authority over entities

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and persons not previously subject to FCC jurisdiction, such as electric power companies, and would expand the scope of the Commission's existing jurisdiction over communications entities (telephone companies) whose interstate practices are already subject to FCC regulatory supervision. Railroads and several types of entities which fall within the overall categories of electric power and telephone utility companies are exempted from the Commission's pole attachment regulation (publicly owned power companies, cooperatively organized telephone and power companies). It is estimated that at least 122 investor-owned electric power companies presently have pole attachment agreements with cable television systems. In addition to the Bell System operating companies, there are an estimated 1,600 independent telephone companies which may fall under FCC pole attachment jurisdiction. The Federal Communications Commission estimates that currently there are 7,800 CATV pole attachment contracts in effect, most of which involve entities not specifically exempted from S. 1547, as reported.

S. 1547, as reported, contemplates the assumption by the States of CATV pole attachment regulation, resulting concurrently in preemption by such States of FCC involvement in CATV pole attachment matters in those States. Accordingly, the extent of the Commission's regulatory responsibilities in this area should gradually diminish. It is not possible at this time to estimate the number of States which will eventually recapture CATV pole

attachment jurisdiction from the Commission. At present there are about 15 States which could take such action without enacting special legislation or taking other necessary initial steps.

The committee has been unable to obtain specific predictions of the economic impact on businesses or individuals affected by this bill. The committee has no reason to believe that there will be any impact on personal privacy of businesses or individuals as a result of enactment of S. 1547, as reported. FCC paperwork requirements would not be substantially increased as a result of granting the Commission expanded forfeiture authority. While the Commission's new CATV pole attachment authority might require some increased paperwork as a result of regulations prescribed pursuant to this bill, the committee estimates that such paperwork will gradually diminish as the Commission's initial implementation of CATV pole attachment regulation becomes settled, and as the States act to implement their own CATV pole attachment regulatory plans, thereby replacing FCC involvement in situations where State plans exist.

No additional recordkeeping requirements would be imposed on entities subject to expanded FCC forfeiture authority as a result of this bill. No significantly increased recordkeeping burdens would necessarily fall on entities subject to FCC CATV pole attachment jurisdiction. The 'bill contemplates that the Commission may accept all relevant data and records which affected electric power and telephone companies file or maintain with the various State or local public utility commissions which otherwise regulate the practices of these entities. Furthermore, the bill directs the Commission to institute a simple complaint procedure to adjudicate CATV pole attachment matters on a case-by-case basis, and does not require the Commission to engage in a large scale regulatory program.

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ADDENDUM B

REGULATIONS OF POLE ATTACHMENTS AND PENALTIES AND FORFEITURES

September 20, 1976—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. Staggers, from the Committee on Interstate and foreign Commerce. Submitted the following

REPORT

Together with ADDITIONAL VIEWS

[To accompany H.R. 13372]

[Including cost estimate of the Congressional Budget Office]

The Committee on Interstate and Foreign Commerce, to whom was referred the bill (H.R. 15372) to amend the Communications Act of 1934 to provide just and reasonable rates, terms and conditions for the use of certain rights-of-way by persons desiring to lease space for wire communication, and with respect to penalties and forfeitures, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

Strike out all after the enacting clause and insert in lieu thereof the following:

REGULATION OF POLE ATTACHMENTS

Section 1. Title II of the Communications Act of 1934 is amended by adding at the end thereof the following new section:

"REGULATIONS OF POLE ATTACHMENTS

"Sec. 224. (a) As used in this section:

"(1) The term 'utility' means any person whose rates or charges are regulated by a State or any political subdivision, agency, or instrumentality thereof, or the Federal Government and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for wire communication. Such term does not include any railroad, any person which is cooperatively organized, or any person owned by the Federal Government of any State or political subdivision, agency, or instrumentality thereof.

"(2) The term 'Federal Government' means the Government of the United States or any agency or instrumentality thereof.

"(3) The term 'pole attachment' means any attachment for wire communication on a pole, duct, conduit, or other right-of-way owned or controlled by a utility.

"(b) (1) Except as otherwise provided in paragraph (3) of this subsection, the Commission shall regulate the rates, terms, and conditions for pole attachments. The Commission shall promulgate regulations to provide that such rates, terms, and conditions are just and reasonable.

"(2) Regulations promulgated under paragraph (1) shall not take effect until the expiration of the 9-month period which begins on the date of enactment of this section. Except as otherwise provided by law, the States shall have the opportunity, during such 9 month period and, consistent with the provisions of this section, at any time thereafter, to assert jurisdiction over the rates, terms, and conditions for pole attachments.

"(3) The Commission may not require any utility to provide any pole attachment if the utility has determined that any such attachment should not be permitted due to a matter

not subject to the regulations issued under paragraph (1) of this subsection.

"(4) The Commission shall consult with the advisory board established pursuant to subsection (d) in the promulgation of the regulations under paragraph (1).

"(C) (1) Any State may apply to the Commission, in such form as the Commission shall prescribe, to exempt rates, terms and conditions of pole attachments from the authority of the Commission under subsection (b) (1) and regulations promulgated by the Commission under such subsection. The Commission shall review any such application and make a final determination thereon not later than 3 months after the date of receipt by the Commission of such application. Failure of the Commission to make a final determination within 3 months after the date of receipt of such application shall be deemed to constitute approval for purposes of this section.

"(2) The Commission shall approve the application submitted under paragraph (1) and exempt the rates, terms. and conditions for pole attachments in any State from the authority of the Commission under subsection (b) (1) and regulations promulgated under such subsection if the Commission finds that such State regulates rates, terms, and conditions for pole attachments in a manner designed to provide just and reasonable rates, terms, and conditions for pole attachments in such State. In exercising its authority under this subsection, the Commission may not specify rates, terms, or conditions.

"(3) The Commission, upon request of an interested person, may review any State pole attachment regulatory program which has been exempted from the authority of the Commission under subsection (b) (1) and regulations promulgated under such subsection and, after affording notice and an opportunity for submission of written data, views, and

arguments in accordance with section 553 of title 5, United States Code, withdraw such approval if it finds that such State no longer qualifies for exemption on the grounds stated in paragraph (2). For purposes of this paragraph, the term 'interested person' means any person who has made or seeks to make a pole attachment, or any utility.

"(d) The Commission shall establish an advisory board to assist the Commission in the promulgation of the regulations under subsection (b) (1). Such Board shall include—

"(1) the Chairman of the Federal Power Commission or his delegate: and

"(2) at least one representative of State regulatory authorities nominated by the national organization of State commissions, as referred to in section 410(c) of this Act, and approved by the Commission.".

PENALTIES AND FOREITURES

Sec. 2. (a) Section 503(h) of the Communications Act of 1934 (47 U.S.C. 503 (b)) is amended to read as follows:

"(b) (1) Any person who is determined by the Commission. in accordance with paragraph (3) or (4) of this subsection to have—

"(A) willfully or repeatedly failed to comply substantially with the terms and conditions of any license, permit, certificate, or other instrument or authorization issued by the Commission:

"(B) willfully or repeatedly failed to comply with any of the provisions of this Act or of any rule, regulation, or order issued by the Commission under this Act or under any treaty, convention, or other agreement to which the United States is a party and which is binding upon the United States;

"(C) violated any provision of section 317(c) or 509(a)(4) of this Act; or

"(D) violated any provision of section 1304, 1343, or 1464 of title 18, United States Code;

shall be liable to the United States for a forfeiture penalty. A forfeiture penalty under this subsection shall be In addition to any other penalty provided for by this Act: except that this subsection shall not apply to any conduct which is subject to forfeiture under title II, part II or IiI of title III, or section 307 of this Act.

"(2) The amount of any forfeiture penalty determined under this subsection shall not exceed 2.000 for each violation. Each day of a continuing violation shall constitute a separate offense. but the total forfeiture penalty which may be imposed under this subsection. for acts or omissions described in paragraph (1) of this subsection and set forth In the notice required under paragraph (3) or the notice of apparent liability required by paragraph (4) shall not exceed—

"(A) $20.000 if the violator is (i) a common carrier subject to the pro-visions of this Act. (ii) a broadcast station licensee or permittee, or (iii) a cable television operator ; or

"(B) $5.000, in any case not covered by subparagraph (A). The amount of such forfeiture penalty shall be assessed by the Commission, or its designee, by written notice. In determining the amount of such a forfeiture penalty, the Commission or its designee shall take into account the nature, circumstances, extent, and gravity of the prohibited acts, committed and. with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.

"(3) (A) At the discretion of the Commission, a forfeiture penalty may be determined against a person under this subsection after notice and an opportunity for a hearing before the Commission or an administrative law judge thereof in accordance with section 334 of title 5, United States Code. Any person against whom a forfeiture penalty is determined under this paragraph may obtain review thereof pursuant to section 402(a).

"(B) If any person fails to pay an assessment of a forfeiture penalty determined under subparagraph (A) of this paragraph. after it has become a final and unappealable order or after the appropriate court has entered final judgment in favor of the Commission. the Commission shall refer the matter to the Attorney General of the United States, who shall recover the amount assessed in any appropriate district court of the United States. In such action, the validity and appropriateness of the final order imposing the forfeiture penalty shall not be subject to review.

"(4) Except as provided in paragraph (3) of this subsection. no forfeiture penalty shall be imposed under this subsection against any person unless—

"(A) the Commission issues a notice of apparent liability, in writing, with respect to such person:

"(B) such notice has been received by such person, or the Commission has sent such notice to the last known address of such person, by registered or certified mail : and

"(C) such person is granted an opportunity to show, in writing, within such reasonable period of time as the Commission prescribes by rule or regulation, why no such forfeiture penalty should be imposed. Such a notice shall (i) identify each specific provision, term, and condition of any Act, rule, regulation, order, treaty, convention, or other agreement, license, permit, certificate, instrument, or authorization which such person apparently violated or with

which such person apparently failed to comply: (ii) set forth the nature of the act or omission charred against such person and the facts upon which such charge is based: and (iii) state the date on which such conduct occurred. Any forfeiture penalty determined by the Commission under this paragraph shall be recoverable pursuant to section 504(a) of this Act.

"(5) No forfeiture liability shall be determined under this subsection against any person, if such person does not hold a license, permit, certificate, or other authorization issued by the Commission, unless, prior to the notice required by paragraph (3) of this subsection or the notice of apparent liability required by paragraph (4) of this subsection, such person (A) is sent a citation of the violation charged: (B) is given a reasonable opportunity for a personal inter-view with an official of the Commission, at the field office of the Commission which is nearest to such person's place of residence : and (C) subsequently engages in conduct of the type described in such citation. The provisions of this Paragraph shall not apply, however, if the person involved is engaging in activities for which a license, permit, certificate, or other authorization is required. Whenever the requirements of this paragraph are satisfied with respect to a particular person, such person shall not be entitled to receive any additional citation of the violation charged, with respect to any conduct of the type described in the citation sent under this paragraph.

"(6) No forfeiture penalty shall be determined or imposed against any person under this subsection if—

"(A) such person holds a broadcast station license issued under title III of this Act and if the violation charged occurred—

"(i) more than one year prior to the date of issuance of the required notice or notice of apparent liability ; or

"(ii) prior to the date of commencement of the current term of such license,

whichever is earlier so long as such violation occurred within 3 years prior to the date of issuance of such required notice ; or

"(B) such person does not hold a broadcast station license issued under title III of this Act and if the violation charged occurred more than one year prior to the date of issuance of the required notice or notice of apparent liability."

(b) The first senesce of section 504 (a) of such Act is amended by inserting immediately after "recoverable" the following: "except as otherwise provided with respect to a forfeiture penalty determined under section 503(b) (3) of this Act."

(c) Section 504(b) of such Act is amended (1) by striking out "parts II and III of title III and section 503(b), section 507, and section 510" and inserting in lieu thereof "title II, parts II and III of title III, and sections 503(b) and 507"; and (2) by striking out ", upon application therefor,".

(d) Section 510 of such Act is repealed in its entirety.

EFFECTIVE DATES

Sec. 3. (a) The amendment made by section 1 of this Act shall take effect on the date of enactment of this Act.

(b) The amendments made by section 2 shall take effect on the thirtieth day after the date of enactment of this Act except that the provisions of sections 503 (b) and 510 of the Communications Act of 1934, as in effect on such date of enactment, shall continue to constitute the applicable law with respect to any act or omission which occurs prior to such thirtieth day.

PURPOSE AND SUMMARY OF THE BILL

The bill (H.R. 15372) would amend the Communications Act of 1934 (1) to provide just and reasonable rates, terms,

and conditions for the use of certain rights-of-way by persons desiring to lease space for wire communication, and (2) with respect to penalties and forfeitures.

BACKGROUND AND NEED FOR LEGISLATION

POLE ATTACHMENTS

In the cable television (CATV) industry, the CATV system operator usually attaches his coaxial cable to existing utility company poles. These poles are usually owned by telephone companies and electric utilities which often enter into joint use or joint ownership agreements for the use of each other's poles. These agreements commonly reserve a portion of each pole for the use of communication services. Regardless of who owns the pole, telephone companies usually control the connection space set aside for communication services. It is a part of this portion of the pole that is leased to CATV system operators.

In many communities, because of the lack of available rights-of-way, environmental restrictions, or zoning laws, the CATV operator is unable to construct his own pole plant for the attachment of his coaxial cable. A CATV operator who is unable to use his own pole plant must seek to use existing utility company poles. If the operator is unable to negotiate an acceptable contract with the owners of these poles, he has no legal forum to hear his complaint except in those few States that have assumed jurisdiction over this issue.

The most egregious situation of an impasse in pole attachment rate negotiations occurred on June 8, 1976, when over 1,200 residents in the communities of Dunn, Irwin, Whiteville, and Chadborne, North Carolina, were deprived of CATV service. The concerned utility company forcefully disconnected from its poles the coaxial cable of the CATV operator which was used to provide these residents with CATV service. This bill will make avail~~able to parties~~ such as these, a forum to hear their differences.

The Federal Communications Commission has had pending since 1966 the question of the nature and extent of its jurisdiction over CATV pole attachments. In 1973, the Commission terminated the evidentiary phase of these proceedings and invited comment on and designated for oral argument the issue of the nature and extent of the Commissions jurisdiction over the policies and practices of pole rental charges to CATV operators by telephone common carriers and other utilities.

On September 29, 1975, some of the interested parties to the proceedings on pole attachments at the Commission, the National Cable Television Association (NCTA) and the American Telephone and Telegraph Company (A.T.& T.) entered into an agreement respecting the pole attachment rates charged CATV companies. To aid interested parties who were not part of that settlement and who were negotiating or renegotiating pole attachment agreements, the Commission released a formula which was devised by the Commission staff. Many parties were unable to reach mutual accord over pole rental charges.

On July 1, 1976, the Commission adopted a decision that (1.) concluded the Commission lacks jurisdiction over pole attachment agreement for non-telephone utility poles and (2) instructed its staff to study the jurisdictional, and economic issues involved in the charges, terms, and conditions by which space on telephone poles is leased to CATV systems. Several members of the Commission recognized that Congressional action was necessary in order to reach an ultimate and satisfactory resolution of the pole attachment problem. Approximately 50 per cent of the poles carrying CATV cables are power poles rather than telephone poles. Even if the Commission were to assert jurisdiction over the rental of communications space on telephone poles after its proposed study is finished, such action would still leave the

pole attachment issue in an unsettled state. This Committee feels that H.R. 15372 will resolve the pole attachment issues.

The bill is designed to allow a State to assert jurisdiction during the 9-month period beginning on the date of enactment of this bill or any time thereafter, subject to Commission approval. After the termination of the 9-month period, the Commission rules and regulations shall apply in those States that have not commenced Commission approved regulatory programs. Upon application by a State, the Commission will review the State's regulatory plans in order to determine if the State regulates rates, terms and conditions of pole attachments in a manner designed to provide just and reasonable rates, terms and conditions of pole attachments. In exercising this authority, the Commission may not specify rates, terms, or conditions. The Commission, upon request of an interested person, may review any State Pole attachment regulatory program which was exempted from the authority of the Commission and may withdraw its approval if it finds that such State no longer qualifies for exemption from Commission authority and its rules and regulations.

The bill provides that the Commission may not require any utility to provide any pole attachment if the utility has determined that any such attachment should not be permitted due to a matter not subject to the regulations of the Commission. The Committee expects that the Commission will carefully monitor the pole attachment access situation to see that no de facto denial of access occurs due to any unreasonable rate, term, or condition that may be required by a utility of any person seeking such access. It was the view of the Committee that the Commission report to the Congress. within 3 to 6 months of the effective date of its rules, on the effect of its regulatory program on the CATV pole attachment issue.

PENALTIES AND FORFEITURES

The FCC sought legislation, as part of its legislative program for the 94th Congress amending the Communications Act of 1934 to unify, simplify and make more effective the provisions of sections 503(b), and 510 relating to forfeitures. The legislation was introduced as H.R. 10620 in the House, and an identical bill, S. 2343, was introduced in the Senate. On June 11, 1976 the Senate passed S. 2343, as amended, and the bill was sent to the House and referred to this Committee. Section 2 of H.R. 15372 represents the bill as passed by the Senate except for certain technical changes. It is also substantially the same as H.R. 10620.

The objective of section 2 is to modernize certain of the forfeiture provisions of the Communications Act and to enlarge their scope to cover persons who are currently subject to the Act but not presently subject to the forfeiture provisions, such as cable television systems, users of certain experimental or medical equipment and some communications equipment manufacturers. The changes made by Section 2 will also enable the FCC to enforce their rules more effectively.

The FCC is empowered to revoke station licenses or construction permits; and to issue cease and desist orders for violations of the Act of a Commission rule (section 312) and to suspend operator licenses (section 303(m)) However. Congress recognized that the Commission needed an alternative enforcement tool which could be used to deal with violations which did not warrant the revocation or denial or renewal of a license. Thus, in 1960, Congress enacted legislation which gave the Commission the ability to impose forfeitures or monetary penalties for violations of the Act or a Commission rule by broadcast Licensees or permittees (section 503(b), 74 Stat. 889). In 1962, Congress further amended the Act to allow the Commission to impose

forfeitures in certain instances on non-broadcast radio licensees (section 510 Stat. 68).

The amendments to the Act made by section 2 of H.R. 15372 are consistent with the policy of the Congress to enable the Commission to deal effectively with violations. The Committee has determined that the forfeiture authority of the FCC requires common procedures and uniform sanctions for dealing with broadcast entities, cable television systems, common carriers, and other persons subject to its jurisdiction. In addition, non-broadcast radio licenses are brought under the provisions of section 503(b).

The Committee believes that the revisions contained in section 2 of H.R. 15372 are necessary in order that the FCC have the ability to enforce its rules in an effective yet flexible manner. Enforcement mechanisms other than forfeiture are time-consuming and involve expensive procedures, both for the person charged with a violation and for the Commission and the Government generally. In addition, the FCC has encountered some problems with the Justice Department in referring matters for prosecution (either for civil contempt or for criminal violations) because of the relatively low priority which those matters are afforded. As a result, these other enforcement mechanisms are not effective deterrents to certain types of misconduct.

H.R. 15372 carefully balances the Commission's need for an effective enforcement tool with the right to due process of those persons subject to the Commission's jurisdiction. Forfeiture liability arises only after there has been: (1) written notice of apparent liability (actual or constructive) (2) an opportunity to contest or mitigate liability in writing (3) in the case of a person not holding a license or certificate from the Commission, an opportunity for personal interview, and (4) consideration of any response by the Commission prior to the issuance of an order of liability. If the person against whom the order runs desires to appeal, he has the option of refusing

to pay and seeking de novo review in the Federal District Court. In addition to this streamlined procedure, the FCC can, within its discretion, set the matter for a full adjudicatory hearing in accordance with section 534 of the Administrative Procedure Act. Your Committee believes that either the "show-cause" procedure or the full adjudicatory hearing procedure adequately serves the rights of the persons involved.

Furthermore, forfeiture provides a less severe alternative to revocation or suspension of licenses and a more feasible alternative to cease and desist orders or judicial enforcement against persons who are not required to hold a license and against whom, therefore, license revocation or suspension is not an available penalty.

Your Committee believes that the Commission needs increased maximum fines in order to make the forfeiture procedure a more effective deterrent. The history of the Commission's use of its existing forfeiture authority suggests that it has tailored the fines levied to the nature of the offense and to the ability of the offender to pay. The Commission policy has not been to assess forfeitures at the statutory maximum but rather to consider a series of mitigating factors such as those set. forth in subsection (b) (2). Your Committee expects that the Commission will continue to exercise careful discretion.

There is concern on the part of some cable television system operators that they will be unfairly treated or harassed by the Commission. While the Committee found no evidence that the Commission or any other person has abused the forfeiture authority in the past, the Committee intends to watch closely to see that no such abuse takes place under the new authority provided by H.R. 15372. The Committee fully expects that the FCC will not use this authority in an arbitrary or capricious manner and has provided procedural safeguards according. However, your Committee also expects that the

Commission will vigorously enforce its rules and that all persons subject to Commission jurisdiction will observe those rules, so as not to frustrate and impede the policy and purposes of the Communications Act.

In sum, the expanded forfeiture authority contained in H.R. 15372 is imperative if the FCC is to carry out its mandate under the Communications Act. This comprehensive revision of the forfeiture provisions helps assure greater compliance with the law and substantially benefits persons regulated under the Act and the public as a whole.

COMMITTEE ACTION

The Committee, acting through its Subcommittee on Commmunications, held one day of hearing on July 28, 1976, on H.R. 10620, a bill submitted by the Federal Communications Commission dealing with penalties and forfeitures. And one day of hearings on September 1, 1976, on H.R. 15268 a bill dealing with pole attachments. In addition, the Subcommittee took testimony on pole attachments during hearings on July 28, 1976, on cable television. In the course of these hearings, testimony was taken from representatives of organizations and companies involved in the public utility industry and the CATV industry. Written comments were received from the FCC.

The Subcommittee on Communications met in open mark-up session on September 8, 1976, to consider H.R. 15372 and reported the bill, with amendments to the full Committee.

H.R. 15372 was ordered reported to the House by the Committee on September 16, 1976, by a voice vote while a majority of the Committee was present.

COMMITTEE AMENDMENT

The Committee amendment was an amendment in the nature of a substitute to the text of H.R. 15372 as introduced. The text of the amendment is printed in italics in the reported bill.

SENATE ACTION

The Senate passed S. 2343, a bill dealing with penalties and forfeitures, on June 11, 1976.

SECTION-BY-SECTION ANAYLSIS

SECTION 1

The Communications Act of 1934 is amended by adding a new section (section 224). The Commission shall regulate the rates terms and conditions for pole attachments. The Commission shall promulgate regulations to provide that such rates, terms, and conditions are just and reasonable. The regulations promulgated by the Commission shall not take effect until the expiration of the 9-month period which begins on the date of enactment of this section. Except as otherwise provided by law, the States shall have the opportunity, during this 9-month period and at anytime thereafter to assert jurisdiction over the rates, terms, and conditions for pole attachments subject to the approval of its State regulatory program by the Commission. The Commission may not require any utility to provide any pole attachment if the utility has determined that any such attachment should not be permitted due to a matter not subject to the regulations issued by the Commission. The Commission shall consult with an advisory board which shall include the Chairman of the Federal Power Commission or his delegate and at least on representative of State regulatory authorities nominated by the national organization of State commissions and approved by the Commission.

Any State may apply to the Commission in such form as the Commission shall prescribe to exempt the rates, terms, and conditions of pole attachments in its State from the authority of the Commission. The Commission shall review any such application and make a final determination on such application no later than 3 months after the date of receipt of said application. If the Commission fails to make a final

determination within 3 months after such date, the application shall be deemed to have been approved by the Commission. In approving such application the Commission shall determine if the State regulates rates, terms, and conditions for pole attachments in a manner designed to provide just and reasonable rates, terms, and conditions for pole attachments in that State. In exercising this review authority, the Commission may not specify rates, terms, or conditions. The Commission upon request of an interested person, may review any State pole attachment regulatory program which has been exempted from the authority of the Commission. The Commission may withdraw such approval if it finds that the State no longer qualifies for exemption for Commission authority and its rules and regulations.

SECTION 2

Subsection (a)

This Subsection amends subsection (b) of section 503 of the Communications Act of 1934 (47 U.S.C. 503(b)) to provide as follows:

Paragraph (1) modernizes the provisions of the Communications Act which govern liability for civil penalties (forfeitures). The paragraph provides that any person subject to FCC regulation is liable for a forfeiture. As a result, liability under the Communications Act for civil penalties is extended to many persons not currently liable. Examples include cable systems, users of industrial, scientific, or medical equipment subject to FCC regulation, persons illegally operating without a valid FCC license, and certain communications equipment manufacturers. Liability extends to those who (1) willfully or repeatedly fail to comply substantially with the terms and conditions of any license, permit, certificate, or other instrument or authorization issued by the Commission. (2) willfully or repeatedly fail to comply with any of the provisions of the Communications Act, or of any lawful rule, regulation, or order of the Federal

Communications Commission or (3) violate the criminal code as it relates to communication by wire or radio.

The liability for forfeitures by broadcasters is unchanged by this legislation. However, persons associated with broadcast activities are made liable for forfeitures for the first time. Examples of violations which would occasion such liability are participation in a rigged contest program (47 U.S.C. 509(a) (4)), the broadcast of lottery information (18 U.S.C. 1304), the commission of fraud by means of radio, or television communications (18 U.S.C. 1343), and the use of obscene language on radio (18 U.S.C. 1464).

The paragraph continues existing law by providing that (1) liability for forfeiture under section 503(b) is in addition to other penalties provided by the Communications Act, (2) conduct subject to other forfeiture provisions of the Act does not invoke liability under section 503 (b) This includes the provisions of Title II (relating to common carriers) those of Title III, parts II and Ill (relating to radio equipment and operations on board ship and radio installations on vessels carrying passengers for hire), and Title 5, section 507 (relating to violation of the Great Lakes Agreement).

Paragraph (2) increases the maximum forfeiture for each violation to $2,000. Previously the maximum was $1,000 for broadcast licensees, $100 for those operating nonbroadcast radio stations, and, of course, nothing for those not previously covered by the forfeiture provisions.

Paragraph (2) also provides that each day of a continuing violation constitutes a separate offense. This is a change for nonbroadcast licensees who were previously subject to only a single forfeiture for any one type of violation. irrespective of the number of violations However, paragraph (2) sets a limit on the total forfeiture penalty imposed for multiple violations set forth in a single notice of $20,000 for common carriers, broadcast station licensees, and cable operators and $5,000 for others.

The Commission is directed to take into account the nature, circumstances, extent, and gravity of the prohibited acts committed and the violator's culpability, prior offenses, ability to pay and other matters as justice may require when it sets the amount of the forfeiture.

Paragraph (3) gives the FCC its choice of using an adjudicatory hearing under section 554 of the Administrative Procedure Act or the traditional written "show cause" proceeding under new paragraph (4). Under this procedural alternative the FCC must issue a notice and grant an opportunity for a hearing before the Commission or an Administrative Law Judge. Once the Commission has reached a final judgment on a forfeiture penalty, the violator may seek judicial review pursuant to section 402(a) of the Communications Art which is the appellate procedure applicable to any final FCC order. Any person who fails to pay the forfeiture penalty after it has become final and unappealable is subject to a collection action in the appropriate District Court of the United States.

Paragraph (4) describes the alternate forfeiture procedure avail able to the FCC. If the FCC chooses to invoke this procedure no forfeiture liability attaches unless a written notice of apparent liability for issued by the Commission and either was actually received or was sent by registered or certified mail to the person's last known address. The notice must specifically identify the particular provision of law, rule, regulation, agreement, treaty, convention, license. Permit certificate, or other authorization or order involved. Additionally, the paragraph retains the current requirement that any person notified be granted an opportunity to show in writing within a reasonable period why he should not be held liable.

Paragraph (5) is new. It provides special procedural protection in addition to the provisions of paragraphs (3) and (4) to everyone except those persons who hold or are engaged

in activities which require an FCC license, permit, certificate, or other authorization from the Commission or any person who is providing any service by wire subject to the Commission's Jurisdiction.

The Commission must first send to such a person a citation of the violation and provide a reasonable opportunity for a personal interview with an FCC official at the FCC field office nearest the person's residence. No forfeiture liability under the amended subsection attaches unless the person has thereafter engaged in the conduct for which the citation of violation was sent. When a person subsequently engages in the same conduct for which he has already been sent a citation and given an opportunity for interview, no further citations need be sent. Any subsequent notice and forfeiture may extend not only to the conduct occurring subsequent to the citation of violation, but also to the initial conduct for which the notice of violation was sent and opportunity for personal interview given.

Paragraph (6) amends the present periods for forfeiture liability. For persons holding a broadcast station license under Title III of the Communications Act, no forfeiture liability attaches for any violation occurring before the current license term or 1 year prior to the date the notice of apparent liability is issued, which ever is earlier. In no event can a notice be issued more than 3 years after the date of the violation. For everyone else, no forfeiture liability attaches to violations 1 year before the date of the notice issued.

Subsection (b)

This subsection conforms subsection 504(a) of the Communications Act to new subsection 503(b) (3). A trial de novo in the Federal District Court will not be necessary in the case of a 303(b) (3) adjudicator proceeding.

Subsection (c)

This subsection amends existing subsection 504(b) of the Communications Act which gives the Federal Commun-

ications Commission authority to mitigate or remit forfeitures. The FCC is given authority to remit or mitigate common carrier forfeitures imposed under Title IT of the Act. It conforms subsection 504(a) to reflect the repeal of section 510 accomplished by subsection (d) and it makes the decision to mitigate or remit forfeitures solely a function of the Commission's discretion by deleting the existing requirement that the person liable must apply for mitigation or remission.

Subsection (d)

This subsection repeals existing section 510 of tile Communications Act which currently provides for forfeitures by nonbroadcast licensees and operators.

All of the offenses enumerated in section 510 are consolidated in amended subsection 503 (b) The notice, limitation, maximum forfeiture amount and show cause procedures are amended and consolidated in proposed subsection 503 (b) as discussed above. The requirement that the FCC provide an opportunity for a personal field interview to nonbroadcast station licensees after issuing a notice of apparent liability is deleted.

SECTION 3

Section 1 of this bill shall take effect upon enactment. Section 2 of this bill shall take effect on the 30th day of enactment except that sections 303(b) and 510 of the Communications Act of 1934, as in effect on the date of enactment, shall continue to constitute the applicable law with respect to any act or omission which occurs prior to the 30th day.

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COMMUNICATIONS ACT OF 1934

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TITLE II—COMMON CARRIERS

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REGULATIONS OF POLE ATTACHMENTS

SEC. 224. (a) As used in this section:

(1) The term "utility" mean any person whose rates or charges are regulated by a State or any political subdivision, agency, or instrumentality thereof, or the Federal Government and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for wire communication. Such term does not include any railroad, any person which is cooperatively organized, or any person owned by the Federal Government or any State or political subdivision, agency, or instrumentality thereof.

(2) The term "Federal Government" means the Government of the United States or any agency or instrumentality thereof.

(3) The term "pole attachment" means any attachment for wire communication on a pole, duct, conduit, or other right-of -way owned or controlled by a utility.

(b)(1) Except as otherwise provided in paragraph (3) of this subsection, the Commission shall regulate the rates, terms, and conditions for pole attachments. The Commission shall promulgate regulations to provide that such rates. terms, and conditions are just and reasonable.

(2) Regulations promulgated under paragraph (1) shall not take effect until the expiration of the 9-month period

which begins on the (late of enactment of this section. Except as otherwise provided by law, the States shall have the opportunity, during such 9-month period and, consistent with the provisions of this section, at any time, thereafter, to assert jurisdiction over the rates, terms, and conditions for pole attachments.

(3) The Commission may not require any utility to provide any pole attachment if the utility has determined that any such attachment should not be permitted due to a matter no subject to regulations under paragraph (1) of this subsection.

(4) The Commission shall consult with the advisory board established pursuant to subsection (d) in the promulgation of the regulations under paragraph (1).

(c)(1) Any State may apply to the Commission, in such form as the Commission shall prescribe, to exempt rates, terms, and conditions of pole attachments from the authority of the Commission under subsection (b) (1) and regulation. ptomulgated by the Commision under such subsection. The Commission shall review any such application and make a final determination thereon not later than 3 months after the date of receipt by the Commission of such application. Failure of the Commission to make a final determination within 3 months alter the date of receipt of such application shall be deemed to constitute approval for purpose of this section.

(2) The Commission shall approve the application submitted under paragraph (1) and exempt the rates, terms, and conditions for pole attachments in any State from the authority of the Commission under subsection (b) (1) and regulations promulgated under such subsection if the Commission finds that such State regulates rates, terms, and conditions for pole attachments in a manner designed to provide just and reasonable rates, terms, and conditions for pole attachments in a manner designed to provide just and

reasonable rates, terms, and conditions for pole attachments in such State. In exercising its authority under this subsection. The Commission may not specify rates terms or conditions.

(3) The Commission, upon request of an interested person. May review any state pole attachment regulatory program which has been exempted from the authority of the Commission under subsection (b) (1) and regulations promulgated under such subsection and, after affording notice and an opportunity for submission of written data, views, and arguments in accordance with section of title 5, United States Code, withdraw such approval if it finds that such State no longer qualifies for exemption on the grounds stated in paragraph (2). For purposes of this paragraph, the term "interested person" means any person who has made or seeks to make a pole attachment, or any utility.

(d) The Commission shall establish an advisory board to assist the Commission in the promulgation of the regulations under subsection (b) (1). Such Board shall include—(1) the Chairman of the Federal Power Commission or his delegate: and

(2) at least one representative of State regulatory authorities nominated by the national organization of State commissions, as referred to in section 410(c) of this Act, and approved by the Commission.

* * * *

Hon. LIONEL VAN DEERLIN,

Chairman, Subcommittee on Communications. Committee on infer-state and Foreign Commerce, House of Representatives, Washington D.C.

DEAR MR. CHAIRMAN: This letter is in response to your request for the Commission's comments on H.R. 15268. This bill, which was introduced on August 25, 1976, would amend

the Communications Act to provide for the regulation of rates for the attachment of interstate communications wires to utility poles. As you know, for the last month the Commission's Office of Plans and Policy has been engaged in a study of the jurisdictional and economic issues involved with regard to pole line attachments. In view of the fact that this study will not be completed until the middle of October and, in light of the extremely limited time afforded to prepare these comments, they cannot be as detailed or fully considered as they might otherwise be. However, we hope that they will be of some value to you in your deliberations.

The Commission has been concerned for several years with issues relating to the attachment of cable television cables to the utility poles of telephone and electric power companies. Because of a strong feeling on the Commission's part that additional regulation should be undertaken only when other alternatives have failed and because of significant questions as to the Commission's jurisdiction in this area, we have sought to encourage the industries involved to find a voluntary means of resolving their disputes. Regardless of the outcome of the proposed legislation, we believe that our efforts in this area have been beneficial to the public.

We believe that a number of questions are raised by the specific provisions of H.R. 15268. For example, section 224 of the proposed act provides the Commission with authority to promulgate rules and regulations which shall assure just and reasonable rates, terms, and conditions for pole attachments and to promulgate minimum standards which a state must meet or exceed if it wishes to continue or commence regulation of pole attachments. In addition, it further provides that the Commission shall accomplish both of these tasks within three moths after the date of enactment of the legislation. This extremely short time frame for the promulgation of rules and standards is simply unrealistic in our belief. In fact, our staff's best estimate of the time

necessary to conclude an orderly rulemaking on this complicated subject is in the neighborhood of at least one year.

Questions are also raised by the bill's lack of specificity as to the intent of a number of its provisions. The bill, is for example, silent with respect to the manner as well as the form which pole attachment regulations by the Commission might take. In this regard, it is unclear whether the bill envisions the adoption by regulation of a ratemaking formula by the Commission which provide for recovery of certain costs and be applied across the board or whether the proposed inclusion of pole line attachment regulation in Title II of the Communications Act implies an intent that the Commission provide a regulatory plan which would require numerous tariff filings. Further, the bill does not provide any answer with respect to the legislative intent as to the "minimum standards" which states would have to "meet or exceed" to take jurisdiction over pole attachment rates. Would it be adequate, for example, for a state simply to charge an agency with the duty of insuring that pole attachment rates are "just and reasonable"? We believe that explanatory language which would provide guidance on these and other issues would be of help to both the Commission and to the states.

A number of other somewhat more technical questions are raised by the specific provisions of H.R. 15268. For example, the term "wire communications" which is defined in section 3 of the Communications Act is a fairly broad term which includes all forms of wire communications, not merely cable television. Thus under the proposed bill, the Commission might be involved in assuring just and reasonable rates for the use of poles by not only cable television system operators, but also by many other users of wire commutations. We understand and that, in addition to cable systems, a large number of other entities utilize space on utility poles. These include public safety uses such as police, fire, and traffic

signalling, in addition to use by communications common carriers such as Western Union. For many years, Western Union and electric utility companies have maintained reciprocal arrangements with the Bell System whereby each is permitted to make use of the other's poles. In Addition to these major users, there are lease arrangements involving railroad signalling, the operation of coal companies and numerous other commercial and noncommercial uses (some involving only one or two poles and others which are far more extensive in nature). It seems certain that the scope of a regulatory program designed to insure just and reasonable rates for the leasing of pole space by all of these entities would be much larger than that necessary to insure just rates for cable systems. We would recommend therefore that if the legislative intent of this bill is merely to remdy pole attachment problems which area importance to the cable television industry, then its application should be so limited, preferably by inserting the term "cable television system" as defined by 47 C.F.R. 76.5(a) in lieu of "wire communication."

Considerable problems might also be caused by the definition of "state" in proposed section 224(a) (2). In that section, the term "state" is defined to include "any State or political subdivision, agency, or instrumentality thereof" which is incidentally somewhat more inclusive than the definition of that term which is found in section 3 of the Communications Act. It is important to bear in mind that under the more inclusive definition appearing in the proposed bill, municipalities, counties, and other political subdivisions theoretically could apply under section 224(c) (1) for authorization to regulate pole attachment rates. This may present the possibility of different, overlapping, and contradictory structure procedures at the state level.

Section 224 also provides that the Commission shall establish an advisory board composed of the Chairman of the

Federal Power Commission and the Interstate Commerce Commission and at least one representative of State regulatory authorities to assist in the promulgation of rules and minimum standards. Since these persons and their agencies of course would have the opportunity to participate in rulemaking proceedings initiated by the Commission, the establishment of a formal advisory board may be unnecessary. Further, Establishment of such a board might seriously complicate the process of developing rulemaking proceedings, particularly in light of the limited time frame allowed by H.R. 15268.

There also appears to be some question whether the proposed legislation would cover the municipally-owned utility companies in the United States which rough estimates indicate exceed 2,300 in number in number. Section 224(a) (1) defines the term "utility" as follows:

> "Any person whose rates or charges are regulated by a State or the Federal Government and who owns or control poles, ducts, conduits, or rights-of-way uses, in whole or in part, for wire communication. . . ."

The term "person" as defined in section 3(i) of the Communications Act does not mention municipalities although it does include "any corporation joint-stock company, or associate." It is is not clear whether municipally-owned companies could be viewed as "regulated" as that term is used in section 224(a) (1) and thus whether they come under the definition of "utility." Presumably, these questions could be clarified in the reports accompanying the bill.

Finally, we note that while the time frame in which the Commission's comments on this legislation has allowed us to come to only tentative and somewhat speculative conclusions as to possible new manpower needs which will be engendered by the legislation, our initial analysis suggests the possibility that a substantial number of new personnel may be needed-at

least if the Commission is to engage in a Title II regulatory plan which conceivably could require thousands of individual tariff filings. Regardless of the speculative nature of such conclusions, we strongly urge that the Committee consider the possible budgetary impact of enactment of this legislation. In this regard, we further suggest that the Committee might consider the possibility of providing the Commission with the authority and flexibility to provide exemptions from regulations to those small entities who, because of their class or size, it may not be cost effective to regulate.

This letter was adopted by the Commission on September 7, 1976, Commissioner Lee concurring and Commissioner Hooks absent.

By direction of the Commission,

Richard E. WILEY, *Chairman.*

FEDERAL COMMUNICATIONS COMMISSION,

Washington, D.C., September 7, 1976.

Hon. LIONEL VAN DEERLIN,

Chairman, Subcommittee on Communications, Committee on Interstate and Foreign Commerce, House of Representative, Washington, D.C.

DEAR MR. CHAIRMAN: The majority's letter does a creditable job of clinically analyzing some of the substantive and definitional aspects of H.R. 15268. The majority letter, however, comments on the questions of the advisability or necessity of legislation of this bent.

Because of the problems (*e.g.*, summary disconnection orders, unregulated increases for attachments) with which you and your colleagues have become familiar during the present

round of hearings, it is clear that pole attachment charges must be subject to oversight so as not to unfairly burden either the telephone or cable TV rate payers.

It is my view that the FCC presently has jurisdiction over telephone company pole rates under Title II of the Communications Act, and specifically § 202(a):

> "It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage."

The law has made it clear that cable is an interstate service and any charges for an interstate communication service over common carrier facilities is within the FCC province.

At the present time, I do not believe that the Communications Act provides authority for the regulation of rates charged by other utilities.

H.R. 13268 would clarify and remedy the present situation. The federal-deferring-to-state (and local) mechanism for establishing due process standards and providing a forum for rate adjudications is well conceived.

There should be no reasonable objection to legislation of this purpose and I support the concept without reservation. The charges for pole attachments should represent only a proper share of installation, maintenance, depreciation and other legitimate expenses. It is understood that the Commission will require the personnel and resources to

administer this legislation and I am certain that the Congress will be sensitive to the practical consequences thereof.

Thank you for the opportunity to comment on this matter.

Sincerely,

BENJAMIN L. HOOKS, *Commissioner.*

Office Of Telecommunications Policy,

Executive Office Of Tile President,

Washington, D.C., September 3, 1976.

Hon. Lionel Van Deerlin,

Chairman, Subcommittee on Communications, Communications on Interstate and Foreign Commerce, House of Representatives,-Washington, D.C.

DEAR MR. VAN DEERLIN: This is in response to your letter of August 26, 1976, wherein you request the preliminary views of this Office respecting H.R. 15268, a bill to amend the Communications Act of 1934 The bill would lodge primary jurisdiction over the poles, ducts, conduits, or other rights of way used or controlled by a regulated utility, in whole or in part for wire communications, in the Federal Communications Commission. It would require that agency by regulation to: (1) insure just and reasonable rates, terms, and conditions of use by persons desiring to lease such space for wire communications; and (2) provide minimum Federal standards, pursuant to which state regulation of poles and ducts may be enacted.

As a conceptual matter, OTP recognizes that the presence of inherent monopoly structures in utility enterprises may justify and necessitate regulation in order to insure public access to facilities and services at equitable rates. A significant preliminary question is, whether a compelling case are engaging in a pattern of monopoly behavior involving predatory pricing, etc., to such extent that the subject legislation is necessary. While we are aware of particular episodes that appear to support this contention it is not clear to us that the problem has become national in scope. We shall presume to answer this question in the affirmative, however, for the purposes of discussing the legislation.

It must then be asked whether such regulation, long applied to the services provided by public utilities may be applicable as well as to the facilities by which such services are delivered. As a matter of policy, we believe regulation of access to public utility facilities may be justified on the same grounds which warrant regulation of the services rendered by these same facilities. That is, utility services are authorized, and monopoly status typically is conferred, by public law. To serve a greater public good: i.e., a guaranteed service availability, Public rights-of-way are provided for this purpose. It is difficult to see how, from an esthetic, environmental, economic or efficiency stand point, the public would benefit by the proliferation of conduits, poles, and ducts by all parties needing such facilities.

It seems reasonable, therefore to require those in a monopoly position to provide for the shared use of facilities utilizing public rights of way under fair rates, terms and conditions. Thus, we are generally sympathetic to the overall objectives of this legislation.

We have three general concerns with this legislative approach, however. First, we question whether the Federal Communications Commission should be authorized to regulate the poles and ducts of non-communications utilities. Second we question the extent to which the FCC should be authorized to preempt state authority in this area, and third we question whether this bill provides adequate guidance to the Commission to carry out the congressional objectives.

With respect to the first question we are concerned with the efficacy and propriety of delegating jurisdiction over electric companies and other noncommunications utilities to the Commission. The provision of pole line space by power companies appears to us to be a "public service" just as their provision of power is a service. If the FCC is to be accorded jurisdiction over the former, why by the same logic should it not be allowed to regulate the provision of power to cable

companies; or the Federal Power Commission (FPC) allowed to regulate telephone service to power companies for that matter? We do not believe that jurisdiction over a consumer, which the FCC admittedly has with respect to cable and telephone carriers, implies the need for specific jurisdiction over the supplier.

Moreover, we doubt that the Commission has, or could develop in the time periods specified in this legislation, the requisite expertise to determine what reasonable charges are for noncommunications common carrier owned facilities would be. The Commission would be unfamiliar forum to communications carriers, as well, in any Commission rate proceedings. Thus, OTP believes that if it is necessary to regulate the pole attachment practices of power utilities in the public interest in order to facilitate interstate commerce in cable communications, jurisdiction should not be conferred on the FCC.

We note also as a technical matter that this legislation reaches only the poles and ducts used in whole or in part for wire communications and owned by a regulated utility. Excluded from FCC regulation thereby would be the poles and ducts owned by a municipality (for street lighting, for example) or by a utility providing no space on its poles for wire communications. For reasons similar to those expressed above with respect to power utilities, we believe this exclusion to be proper.

With respect to the second question, we recognize that cable's deprivation of pole attachment access on a nationwide basis could adversely affect interstate commerce in cable communications, which would justify Federal intervention. We are concerned, nevertheless, that Federal intervention be limited to that which is demonstrably necessary to assure national interests. Regulation of poles and ducts typically has been a function of state agencies which because of their experience and proximity to the problem can flexibly

particularize regulation to account for problems. conditions, and exigencies unique to a locale. Preemptive and expansive Federal regulation would sacrifice such flexibility, and the need for such regulation must be carefully assessed.

Related to the foregoing is our third concern, that this bill provides inadequate guidance to the Commission governing its regulation of poles and ducts. For example. although the bill authorizes state regulation, it provides almost no statutory standards therefore, but confers blanket authority on the Commission to oversee state regulation. Such a legislative approach appears inconsistent with previous initiatives providing for or encouraging state regulation. (See. for example, Federal Coal Mine, Health, and Safety Act of 1969, Pub. L. 91-173. 30 U.S.C. 801 *et seq*. (1971) Food, Drug and Cosmetic Act, 21 U.S.C. §§ 451-470. (1972). Occupational Safety and Health Act, 29 U.S.C. 655, (1975) and Fair Housing Act, 42 U.S.C. 3602 *et seq*. (1973)).

Of particular concern is the fact that while the bill provides a floor, incremental cost, beyond which state pole rates may not be reduced, there is no comparable statutory standard other than the "just and reasonable" requirement respecting a rate ceiling. We would suggest consideration of a legislative approach which authorized the Commission to establish a range of permissible rates up to a maximum, within which state utility agencies could establish particular rates upon petition and proof by the utility. The Commission could review the maximum rate periodically (every 3 or 5 years for example) in order to account for inflation or other factors. This approach would minimize the need for intrusive Federal regulation and a large FCC staff while preserving state initiative and flexibility. It would be analogous to existing procedures by which utilities seek service rate increases, in that the burden of proof for a pole rate increase would be on the utility who would petition the appropriate State commission. I hopefully such an approach would meet the

cable industry's needs while causing the least amount of disruption to utilities and existing rate procedures.

As another alternative, could not a legislative approach be considered that would authorize Commission review of state policy or regulation respecting pole attachment access without authorizing rate regulation by the Commission itself? The sufficiency of state regulation, and Commission oversight thereof, might be made a condition of cable certification, for example. The Federal interest in facilitating interstate commerce in communications would thus be protected. while the advantages inherent in state regulation would be preserved. Of course, these suggestions, offered as constructive alternatives to H.R. 15268, reflect only a preliminary analysis of the problem in view of your need for an expeditious response.

As a final example of the need for adequate statutory guidelines. We note that the bill's statement of purpose indicates the congressional intent to regulate the "rates, terms, and conditions for the use of communication space on poles, ducts . . .". etc. The operative amendments to Title II however. provide only that the "Commission shall promulgate—(A) regulations which shall assure just and reasonable rates, terms, and conditions for pole attachments." It is unclear, therefore, what authority the Commission has to require the expansion of communications space on a utility pole or duct when it is filled up, or to require access to such pole or duct in the first place when there is no such space allocated.

OTP recognizes the great benefits that cable television can confer on the public through its expanded communications capacity. We support also, as a general matter, the need to insure reasonable access by cable television to the poles and ducts owned and operated by regulated utilities. We question, however, for the reasons stated above, whether this legislation properly disposes of the issue at hand. Additionally, we fear

that premature or precipitous action could create more regulatory problems than would be eliminated by this legislation.

The Office of Management and Budget advises that it has no objection to the submission of this report.

All best wishes.

THOMAS J. HOUSER

ADDITIONAL VIEWS OF HON. TIMOTHY E. WIRTH

As the author of this bill and its predecessor, H.R. 15268, I would like to expand on the Committee's statements in this report explaining Section 1 of this legislation.

H.R. 15372 is intended to provide a forum either at the State or Federal level to regulate the rates, terms, and conditions for pole attachments. It was introduced as a result of the Federal Commission's decision that it lacks authority over pole attachment rates charged by power and electric utilities and the fact that many State regulatory bodies have also disclaimed jurisdiction over the rental of space on poles of telephone and electric utilities.

This legislation requires the Federal Communications Commission to regulate the rates, terms, and conditions for pole attachments. It further provides that the Commission shall promulgate regulations to ensure that such rates, terms, and conditions are just and reasonable. Such regulations, however, shall not take effect until nine months after the date of enactment of this bill.

In the intervening nine-month period or at any time thereafter, the States shall have the opportunity to assert jurisdiction over pole attachments. All State regulatory programs, whether adopted before the enactment of the bill, during the nine month period, or at any time thereafter, must be approved by the FCC. The Commission shall grant

approval if it finds the State regulates pole attachments in a manner designed to provide just and reasonable rates, terms and conditions for pole attachments.

In determining whether the manner of State regulation is designed to provide just and reasonable rates. the Commission must first ask whether the agency or tribunal established by the State is impartial Among the factors the Commission should look at in making its determination is whether such agency or tribunal has been charged with the responsibility of regulating the reasonableness of pole attachment rates, terms and conditions to protect the interests of both the consumers of utility services and the consumers of the wire communications involved in the pole attachments. Accordingly, I would expect the Commission to disapprove a regulatory program where a State says that it has the power to regulate pole attachment rates which are too *low* (to protect consumers of utility services) but not the power to regulate pole attachment rates which are too *high* (to protect consumers of wire communications).

In my view, the Commission must do more, however, than merely find that the agency or tribunal established by the State is impartial and ostensibly affords all parties due process. It must also look to see whether the State agency or tribunal has taken into account all relevant factors involved in the provision of role attachments such as the portion of the poles' total usable space which is occupied by each user, the relative weight of the pole attachments and the legal status each user. Thus, if a State were to adopt regulations whereby the cost of owning and maintaining poles were simply divided equally all users, the FCC could and should find that such State does not regulate pole attachments in a manner designed to provide just reasonable rates," even though such State regulations were adopt in a proceeding affording due process to all parties.

In reviewing a state regulatory program though, the Commission may not specify rates, terms or conditions. However, since the mark for both the FCC and the States is the regulation of pole attachment rates on a "just and reasonable" basis, I would expect the States' regulatory programs generally to be consistent with the Commission's approach.

TIMOTHY E. WIRTH.

ADDENDUM C

UTILITY POLE ATTACHMENTS

OCTOBER 25, 1977.—Ordered to be printed

MR. STAGGERS, from the Committee on Interstate and Foreign Commerce, submitted the following

SUPPLEMENTAL REPORT

[Including cost estimate of the Congressional Budget Office]

[To accompany H.R. 7442]

This supplemental report replaces the following sections in order to include additional material and make technical changes: Purpose and summary of the bill, background and need for legislation, Federal Communications Commission action,. committee action, committee amendments, Senate action, section-by-section analysis, oversight findings, inflationary impact statement, and cost estimate.

The Committee on Interstate and Foreign Commerce, to whom was referred the bill (H.R. 7442) to amend the Communications Act of 1934 to provide for the regulation of utility pole attachments. Having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

The amendments (stated in terms of the page and line numbers of the introduced bill) are as follows:

Page 2, after line 5, insert the following:

> (2) The term "State authority" means the government of any State, any political subdivision, agency, or instrumentality of a State, and any public utility district or other similar special purpose district established under State law.

Page 2, line 6, strike out "(2)" and insert in Lieu thereof "(3)".

Page 2, line 9, strike out "(3)" and insert in lieu thereof "(4)".

Page 2, line 13, strike out "(4)" and insert in lieu thereof "(5)".

Page 2, line 19, after "authority." insert the following:

Any such State authority may act at any time to regulate such rates, terms, and conditions. Any such regulations prescribed by the Commission or by any State authority shall assure that rates for pole attachments are just and reasonable.

Page 3, after line 4, insert the following:

SEC. 2. Upon the expiration of the 5-year period that begins on the date of the enactment of this Act—

(1) section 224(a) (4) of the Communications Act of 1934, as added by the first section of this Act, is repealed:

(2) section 224(b) (2) of such Act, as added by the first section of this Act, is repealed ; and

(3) section 224(b)(1) of such Act, as added by the first section of this Act, is redesignated as section 224(b).

PURPOSE AND SUMMARY OF THE BILL

The bill (H.R. 7442, as amended) would amend the Communications Act of 1934 to provide for the regulation of utility pole attachments.

The bill has three major provisions:

First, it gives the Federal Communications Commission the authority to regulate the rates, terms, and conditions of pole attachments in any case where such

rates, terms, and conditions are not regulated by any State authority;

Second, the legislation provides that regulations prescribed by the Federal Communications Commission or by any State authority shall assure that the rates for pole attachments are just and reasonable. A just and reasonable rate, whether prescribed by the Commission or by any State authority, is defined as follows. The lower limit of such a rate shall assure the utility the recovery of not less than the additional costs of providing the pole attachment. The upper limit of such a rate shall assure the utility the recovery of not more than the actual capital and operating expenses of the utility attributable to that portion of the pole, duct or conduit used by the pole attachment. Such portion shall be the percentage of the total usable space on a pole, defined as the space on a utility pole above the minimum grade level which can be used for the attachment of wires and cables, or the total capacity of the duct or conduit, that is occupied by the pole attachment;

Third, the definition of a just and reasonable rate, otherwise known as the "zone of reasonableness," is repealed 5 years from the date of enactment of the bill.

BACKGROUND AND NEED FOR LEGISLATION

The cable television industry brings broadcast signals and other entertainment and information to its subscribers by attaching its wire to existing utility company poles (for purposes of this report. the word "poles" also refers to ducts or conduits). These poles are usually owned by telephone companies and electric utilities which often enter into joint use or joint ownership agreements for the use of each other's poles. These agreements commonly reserve a portion of each pole for the use of communication services. Regardless of who owns the pole, telephone companies usually control the

connection space set aside for communication services. It is a part of this portion that is leased to a cable system for the attachment of its wire. Use is made of existing poles rather than newly placed poles due to the reluctance of most communities, based on environmental considerations, to allow an additional, duplicate set of poles to be placed. Therefore, some form of accommodation must be reached by owners of poles and those wishing to have access to existing poles.

This bill (H.R. 7442, as amended) is designed to remedy a situation which was first brought to the attention of the Subcommittee on Communications last year. During the 2d session of the 94th Congress, the Subcommittee on Communications held 15 days of cable television oversight hearings during which the issue of pole attachments was discussed. On Wednesday, July 28, 1976, the subcommittee heard testimony from Hon. Charles Rose, Democrate of North Carolina, who had introduced House Resolution 1361, which sought to encourage the Federal Communications Commission (FCC) to assert jurisdiction over pole attachments. Mr. Rose had been moved to introduce such a resolution following a pole attachment dispute in two towns in his district (Whiteville and Chadbourne in Columbus County) and in two towns contiguous to his district (Dunn and Erwin in Harnett County), which caused approximately 1,200 cable television subscribers to lose cable television service. The dispute also threatened to disrupt service of 2,000 additional subscribers in Fayetteville, N.C. The subcommittee also heard testimony from representatives of the cable television industry and from telephone and electric companies. Cable industry representatives testified that they are totally dependent on telephone and power company poles for the purposes of building and extending their systems and that such utilities, by virtue of their monopoly ownership of poles, are in a position to force cable television companies seeking to attach their wire to utility poles into virtual

contracts of adhension. Such contracts, it was asserted, leave no room for negotiation and are offered to cable television companies on a take-it-or-leave-it basis. In addition, the subcommittee heard that once cable television companies are permitted to attach their wire to utility poles, the ratc charged for such attachments can be adjusted upward without any justification offered by the utility and without any opportunity for negotiation with the utility. Cable television industry representatives testified further that the pole attachent controversy exists, in part, because telephone companies consider the cable industry to be a potential competitor, and pole disputes are the result of anticompetitive conduct. Finally, they states that accurate estimates of the cost of the pole attachment to the utility cannot be computed unless and until utility companies are willing to disclose capital investment and depreciation costs.

Testimony received from utility company representatives foused report on two major points, raising the jurisdictional question about whether the FCC had the authority to regulate the rates charged by telephone which and electric power companies for the communication space on their poles and the policy question about whether the FCC or a State authority should regulate these rates. Such witnesses stated that pole rental charges should be based on a formula that correctly assigns usage to each attachment and that the avenge price charged cable companies for their attachment does not approximate, or even come close to, what it would cost cable television systems to erect their own pole plant.

On August 25, 1976, Mr. Wirth, Democrat of Colorado, along with Chairman Van Deerlin, Democrat of California, and Mr. Rose, introduced H.R. 15268, a bill granting the FCC the authority to regulate the rates, terms and conditions for the use of communication space on utility poles. The bill also gave the States the authority to so regulate provided that certain federally established minimum standards were met.

On August 31, 1976, Chairman Van Deerlin, along with Mr. Wirth, Mr. Waxman, Democrat of California, Mr. Brown of Ohio, Mr. Florio, Democrat of New Jersey, and Mr. Rose introduced H.R. 15372, identical to H.R. 15268 except for the addition of a section giving the FCC the right to extend its authority to levy penalties and forfeitures for the willful or repeated violation of FCC rules and regulations.

The Subcommittee on Communications held 1 day of hearings on H.R. 15268 and H.R. 15372 on September 1, 1916. The arguments presented in support of and in opposition to the pole attachment sections of the legislation were similar to those heard on July 28, 1976, at the earlier hearing.

The subcommittee met in open markup session on September 8, 1976, to consider H.R. 15372 and reported the bill, with amendments, to the full Committee on Interstate and Foreign Commerce.

H.R. 15372 was ordered reported to the House by the full committee on September 16, 1976, by a voice vote. Due to controversy surrounding section 2 of the bill, extending the authority of the FCC to levy penalties and foreitures for the willful or repeated violation of its rules and regulations, H.R. 15372 never reached the floor of the House for a vote.

During subsequent months further negotiations on the pole attachment issue were held by interested parties. On March 7, 1977, representatives of the National Cable Television Association (NCTA), which represents a large segment of the cable television industry, and the National Association of Regulatory Utility Commissioners (NARUC), which represents the State regulators, presented Chairman Van Deerlin with a copy of a draft pole attachment bill jointly agreed to by both parties. On March 10, 1971, the draft legislation was circulated to a number of interested parties for comment. On May 6, 1977, Mr. Wirth and Mr. Broyhill, Republican of

North Carolina, circulated a "Dear Colleague" letter inviting members to join them in cosponsoring the draft NCTA/NARUC legislation. On May 25, 1977, Mr. Wirth, Mr. Broyhill, and 15 cosponsors introduced H.R. 7442 in the House. Subsequently, duplicate bills, H.R. 8075, H.R. 8675, and H.R. 8564 were introduced with additional cosponsors.

On July 22, 1977, the Subcommittee on Communications held 1 day of hearings on the subject of cable television pole attachments to bring the record up to date. A panel consisting of cable television industry, utility company, FCC and NARUC representatives considered the following questions:

1. Are there barriers to reaching mutually acceptable pole attachment agreements that require the intervention of a third party?

2. If a forum is necessary for the resolution of pole attachment disputes, in which jurisdiction should such authority be vested?

3. What method of allocating pole attachment costs among users would be fair and reasonable?

Representatives of the cable television industry testified that from heir standpoint the situation had deteriorated since the subcommittee had last considered the problem, and that a legislative solution was still the favored method of resolving continuing differences. Such representatives stated that the cable industry still has a near total dependence on utility poles for delivering service to subscribers and that this dependence was having an adverse economic impact on their industry.

The industry attaches to approximately 10 million utility poles at an average rate of $3.50 per pole per year. As of July 1977, there were 27 states in which pole attachment disputes existed. Seven independent telephone companies announced an average rate increase of 67 percent for pole attachments, from an average of $4 per pole to an average of $6.67 per pole. In addition, one independent telephone company

canceled all pole contracts, affecting in excess of 150,000 poles. Thirty-three electric utility companies also announced rate increases. The overall 55 percent increase adjusted the rates from an average of $3.90 per pole to an average of $6.05 per pole. For the 41 companies discussed above, the combined overall rate increase was 61 percent. The impacted areas in these 27 States contain approximately 25.4 million television households, 35 percent of all the TV households in the United States. Cable television households in the impacted areas total 4.3 million, or 39 percent of all the cable house-holds in the United States. Finally, the pole attachment agreement between NCTA and the American Telephone and Telegraph Co. (A.T. & T.) is due to expire on December 31, 1978, and the cable industry indicated its concern about the potential effect of such expiration. Their prediction was that the number of pole attachment disputes would dramatically increase upon the expiration of the agreement due to the fact that Bell System companies provide 85 percent of the telephone service in the United States and cover a corresponding large area of cable television service. The contrast was also made that 11 months prior to the July 22, 1977, hearing, only 23 utility companies in 16 States were involved in pole disputes with cable systems. In April 1977, cable systems were involved in disputes with 32 utilities in 20 States and as of July 1977, those numbers had risen to 41 utilities in 27 States.

The telephone and electric company representatives testified that the pole problems that exist between them and the cable television industry are not sufficiently significant to warrant a legislative solution, particularly one which vests authority for such regulation in a Federal agency. If there is to be any regulation of pole attachments, they contended, it ought to be at the State level through public service or public utility commissions. The utility representatives stated that such commissions have a high degree of expertise with respect to the operation and maintenance of utility

distribution poles and are more sensitive to local problems than a Federal agency would be. Utility representatives testified further, that pole disputes center on one major issue and that is that the cable industry believes that it should pay a rental fee that is equal to the incremental cost to the utility for the pole attachment and the utilities believe that they should receive from the cable company a rental fee that is equal to the value of the space a that is rented. Such a range is admittedly wide, but the utilities believe that the interested parties can negotiate a rate acceptable to all parties, or failing that, can seek a resolution on the State level.

A representative of the FCC testified that on the basis of Commission research, there have been relatively few formal pole attachment disputes which have resulted in actual litigation, but that the testimony of the cable television industry constituted a fair representation of the potential problem. Such an assessment, it was stated, was based on the appearance of unequal bargaining power on the part of cable television companies and utility companies. The FCC witness testified further that the Commission believes that if the creation of a regulatory forum is necessary for the resolution of pole attachment disputes, such a forum would be most appropriately lodged with the States. The Commission based its position on the belief that the resolution of such matters involves the need for expertise with respect to not only telephone company regulation but also power company regulation. The FCC representative testified that the Commission does not have such expertise and if one adds the necessity to understand local problems, it would be preferable, according to the Commission, to decentralize such regulation rather than centralize it within a Federal agency. Finally, the FCC believes that Federal regulation of pole attachments would place an undue administrative and economic burden on the Commission.

FEDERAL COMMUNICATIONS COMMISSION ACTION

The Federal Communications Commission has had pending since 1966 the question of the nature and the extent of its jurisdiction over pole attachments. In 1973, the Commission terminated the evidentiary phase of its inquiry and invited comment on, and designated for oral argument, the issue of the nature and extent of the Commission's jurisdiction over the policies and practices of pole rental charges to cable companies by telephone common carriers and other utilities.

On September 29, 1975, the National Cable Television Association and American Telephone and Telegraph Co. entered into an agreement with respect to pole attachment rates charged to cable companies. To aid interested parties who did not participate in the agreement and who were negotiating or renegotiating pole attachment agreements, the Commission released a formula, devised by its staff, to be used in determining reasonable pole attachment rates.

On July 8, 1976, the Commission decided that it did not have jurisdiction over poles owned by power companies and deferred a decision regarding telephone company-owned poles pending further staff study of the "jurisdictional and economic issues."

On March 18, 1977, the FCC issued a Memorandum Opinion and Order in which it affirmed its July 8, 1976 decision regarding jurisdiction over power company-owned poles, and stated that it saw no reason to separate the resolution of policy and legal issues of jurisdiction on the basis of whether the party owning poles is a telephone company or a nontelephone company.

STATE REGULATION OF POLE ATTACHMENTS

On September 21, 1977, Governor Edmund Brown signed into law S.B. 177, a bill to regulate pole attachments. The

California bill, which becomes effective January 2, 1978, represents the first such action by a State legislative body and enacts into law regulation of utility poles which includes standards for the regulatory body. Such standards, which include a zone within which rates may be set, are the same as those contained in H.R. 7442. The California pole attachment bill, however, does not include a sunset provision.

Connecticut and Hawaii also regulate utility pole attachments pursuant to their general utility regulation of cable television.

According to a March 1977 report issued by the Cable Television Bureau of the Federal Communications Commission, "Cable Television Pole Attachment State Law and Court Cases," no other States exercise rate regulation for cable television pole attachments.

COMMITTEE ACTION

The committee, acting through its Subcommittee on Communications, held one day of hearings on the need for pole attachment legislation on July 22, 1977. In the course of these hearings testimony was taken from representatives of the cable television industry, telephone the companies, power companies, the Federal Communications Commission and State regulators. In addition, written comments were received from approximately 40 interested parties.

The Subcommittee on Communications met in open markup session on October12, 1977, to consider H.R. 7442 and reported the bill, with amendments, by a unanimous vote to the full committee.

H.R. 7442 was ordered reported to the House by the committee on October 18, 1977, by a unanimous voice vote while a majority of the committee was present.

COMMITTEE AMENDMENTS

The committee amendments to the text of H.R. 7442 are printed in italic in the reported bill.

SENATE ACTION

The Senate Committee on Commerce, Science, and Transportation reported S. 1547 from committee to the Senate on October 11, 1977. No report is presently available. S. 1547 deals with pole attachments but also deals with penalties and forfeitures assessed for violation of FCC rules and regulations. Your committee has held no hearings on penalties and forfeitures in this Congress, and therefore, H.R. 7442 contains no such language.

SECTION-BY-SECTION ANALYSIS

The bill amends title II of the Communications Act of 1934 by adding a new section 224.

Section 1(a) of the bill defines—

(1) "Utility" as any person who provides telephone service or electric energy to the public and who owns or controls poles, ducts, conduits, or right-of-way used, in whole or in part, wire communication. Such term does not include any corporation or other similar entity owned by the Federal Government;

(2) "State authority" as the government of any State, a political subdivision, agency, or instrumentality of a State, and any public utility district or other similar special purpose district established under State law;

(3) "Federal Government" as the Government of the United States or any agency or instrumentality thereof;

(4) "Pole attachment" as any attachment for wire communication on a pole, duct, conduit or other right-of-war owned or controlled by a utility; and

(5) "Usable space" as the space on a utility pole above the minimum grade level which can be used for the attachment of wires and cables.

Section 1(b) states—

(1) That the FCC shall regulate the rates, terms, and conditions for pole attachments in any case in which such rates, terms, and conditions are not regulated by any State authority. Any such State authority may act at any time to regulate such rates, terms, and conditions. Any such regulations prescribed by the FCC or by any State authority shall assure that rates for pole attachments are just and reasonable; and

(2) That a just and reasonable rate, whether prescribed by the FCC or by any State authority, shall assure the utility the recovery of not less than the additional costs of providing pole attachments nor more than the actual capital and operating expenses of the utility attributable to that portion of the pole, duct, or conduit used by the pole attachment. Such portion shall be the percentage of the total usable space on a pole, or the total capacity of the duct or conduit, that is occupied by the pole attachment.

Five years after enactment, section 2 of the bill—

(1) repeals section 1(a)(4) of the bill which added the "usable space" definition;

(2) repeals section 1(b)(2) of the bill which contained rate guidelines; and

(3) redesignates section 1(b)(1), which gave the FCC authority to regulate rates, as section 1(b).

The committee wants to state its intention that; (1) the FCC establish a complaint procedure for the purpose of enforcing this legislation, rather than act on its own initiative to seek out and resolve pole attachment disputes; (2) the maximum

lawful pole attachment rate be computed by multiplying the percentage of the usable space on a Pole occupied by the cable television pole attachment times the total actual capital and operating expenses of the pole for the period covered by the rate; and, (3) nothing in this legislation. especially the ratemaking criteria, be construed to apply in any area of Federal or State regulation other than in the regulation of cable television pole attachments.

OVERSIGHT FINDINGS

There are no formal oversight findings by the committee pursuant to clause 2(l)(3)(A) of rule XI of the Rules of the House of Representatives.

No oversight findings have been submitted to the committee by the Committee on Government Operations pursuant to clause 2(l)(3)(D) of rule XI of the Rules of the House of Representatives.

INFLATIONARY IMPACT STATEMENT

Pursuant to clause 2(1)(4) of rule XI of the Rules of the House of Representatives, the committee makes the following statement regarding the inflationary impact of the reported bill:

> The committee is unaware that any inflationary impact on the economy will result from the passage of HR. 7442.

COST ESTIMATE

Pursuant to clause 7 of rule XIII of the Rules of the House of Representatives, the committee estimates that there will be some costs involved in carrying out this bill in each of the 5 fiscal years following the enactment of this bill. The committee was unable to determine the exact amount of these projected costs with the information available to it.

In regard to clause 2(1)(3)(C) of rule XI of the Rules of the House of Representatives, the committee includes the following cost estimates submitted by the Congressional Budget Office relative to the provisions of H.R. 7442.

CONGRESSIONAL BUDGET OFFICE—COST ESTIMATE

OCTOBER 19, 1977.

1. Bill number: H.R. 7442.

2. Bill title: Communications Act Amendment of 1977.

3. Bill status: As ordered reported by the House Committee on Interstate and Foreign Commerce, October 18, 1977.

4. Bill purpose: This bill provides for the regulation, by the Federal Communications Commission (FCC), of rates, terms and conditions for attachments to utility poles, conduits, or other rights-of-way for wire communication owned by utilities. The FCC is to perform such regulation only in the absence of State regulation.

5. Cost estimate:

[In thousands of dollars]

Fiscal year:	Estimated costs
1978	137
1979	441
1980	470
1981	500
1982	532

The costs of this bill fall within budget function 400.

6. Basis of estimate: This bill increases the regulatorv responsibilities of the FCC, thus increasing its manpower requirements. It is assumed, however, that some of the regulatory functions will be performed by the various States.

It is estimated that the FCC will need to hire 20 additional lawyers, economists and clerks to first develop attachment regulations and then process complaints.

For the purpose of this estimate, it is assumed that this bill will be enacted on or about April 1, 1978. On this basis, these personnel requirements will result in an estimated cost of $137,000 during the latter part of fiscal year 1978, increasing to $441,000 when fully implemented in fiscal year 1979. Costs in the following years reflect inflation and shifts in manpower resources as actual processing of complaints begins.

7. Estimate comparison: None.

8. Previous CBO estimate: On October 17, 1977, CBO prepared a cost estimate for S. 1547, the corresponding Senate bill ordered reported by the Senate Committee on Commerce, Science, and Transportation. S. 1547 is estimated to result in somewhat higher costs, due to the additional requirements regarding forfeiture regulation.

9. Estimate prepared by: Mark Berkman:

10. Estimate approved by:

C. G. NUCKOLS
(For James L. Blum),
Assistant Director for Budget Analysis.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows new matter is printed in italic, existing law in which no change is proposed is shown in roman):

COMMUNICATIONS ACT OF 1934

* * * *

TITLE II—COMMON CARRIERS

* * * *

UTILITY POLE ATTACHMENTS

SEC. 224 (a) *As used in this section:*

(1) The term "utility" means any person who provides telephone service or electric energy to the public and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for wire communication. Such term does not include any corporation or other similar entity owned by the Federal Government.

(2) The term "State authority" means the government of any State, any political subdivision, agency, or instrumentality of a State, and any public utility district or other similar special purpose district established under State law.

(3) The term "Federal Government" means the Government of the United States or any agency or instrumentality thereof. .

(4) The term "pole attachment" means any attachmentt for wire communication on a pole, duct, conduit, or other right-of-way owned or controlled by a utility.

(5) The term "usable space" means the space on a utility pole above the minimum grade level which can be used for the attachment of wires and cables.

(b)(1) The Commission shall regulate the rates, terms, and conditions for pole attachments in any case in which such rates, term, and conditions are not regulated by any State authority may act at any time to regulate such

rates, terms, and conditions. Any such regulations prescribed by the Commission or by any State authority shall assure that rates for pole attachments are just and reasonable.

(2) A just and reasonable rate, whether prescribed by the Commission or by State authority, shall assure the utility the recovery of not less than the additional costs of providing pole attachments nor more than the actual capital and operating expenses of the utility attributable to that portion of the pole, duct, or conduit used by the pole attachment. Such portion shall be the percentage of the total usable space on a pole, or the total capacity of the duct or conduit, that is occupied by the pole attachment.

* * * *

ADMINISTRATION COMMENTS

OFFICE OF TELECOMMUNICATIONS POLICY,
EXECUTIVE OFFICE OF THE PRESIDENT,
Washington, D.C., May 2, 1977.

Hon. LIONEL VAN DEERLIN,

Chairman, Subcommittee on Communications, Committee on Interstate and Foreign Commerce, U.S. House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your letter of March 10, 1977, in which you have requested the comments of this office with respect to the proposed pole attachment legislation agreed to by the National Association of Regulatory Utility Commissioners (NARUC).

The proposed Bill establishes Federal Communications Commission (FCC) Jurisdiction to regulate the rates, terms, and conditions for pole attachments for wire communication if the pole, duct, conduit, or right-of-way is used in whole or in part for wire communications, is owned or controlled by

any person who provides telephone service or electric energy to the public, and the rates, terms, and conditions are not regulated by any State authority.

It requires either the Commission or the State authority, as the case may be, to assure that only just and reasonable rates are charged for pole attachments. A just and reasonable rate must assure the utility the recovery of not less than the additional costs of providing pole attachments nor more than the actual capital and operating expenses attributable to that portion of the pole used by the pole attachment. This latter portion would be the percentage of the total usable space on the pole used by the pole attachment.

In September of last year, the subcommittee considered a similar but more restrictive bill, HR. 15268. That bill placed primary jurisdiction over poles and ducts in the FCC and authorized the Commission to establish minimum standards to be met by State regulatory authorities choosing to regulate pole attachment arrangements.

OTP expresses no view on whether a compelling case has been made justifying pole attachment legislation as necessary to assure CATV access at reasonable rates to utility facilities and services. We believe, as a general principle, monopoly utility facilities should be available to serve the general public good. This principle certainly extends to public rights-of-way used by those utilities. We view this legislation as consistent with that principle.

We do not believe the FCC should be delegated general jurisdiction over the facilities of electric companies and other noncommunications utilities. Jurisdiction over cable television companies and telephone companies does not necessarily imply the FCC needs or has the expertise required for specific jurisdiction over all suppliers of pole and conduit space, including electric utility companies. However under the proposed bill, FCC jurisdiction would not exist if the state

regulatory authorities adopt any plan to regulate pole and conduit space. This accommodates our concerns. In this regard, we are advised that the NARUC has prepared model legislation for states to adopt if they so choose.

The NCTA/NARUC bill provides incremental costs as a rate floor and the actual capital and operating expenses of the utility attributable to that portion of the pole, duct, or conduit used by the pole attachment as a rate ceiling for pole attachment charges. Assuming that actual capital expenses include a reasonable return on capital based upon a regulated industry standard determined in a proceeding consistent with the principles of the Administrative Procedure Act, we believe this is an adequate rate standard. The burden of proof for pole rate increase should be on the utility which has control of the right-of-way when it chooses to set or increase pole attachment rates. We suggest that clarifying language be added to the bill to place the burden of proof on whichever party seeks to change the applicable pole attachment rates.

We believe the pole attachment formula developed by the FCC staff in November of 1975 is a reasonable approach to the pole attachment rate problem and that the legislative history of this proposed bill should make clear that the FCC proposal is fully consistent with the standards in the legislation.

The proposed bill does not contain a clear statement of intent by the Congress to circumscribe the rate setting authority of State authorities which do exercise pole attachment jurisdiction. The "just and reasonable" standard should be made clearly applicable to states. We suggest that a new sentence be inserted following the first sentence in section 224(b) as follows: "No rate, whether prescribed by the Commission or a State authority, shall be other than just and reasonable as herein defined." The next sentence should be modified to eliminate duplicative wording.

This proposed legislation addresses itself only to rate regulation, but its statement of purpose indicates an intent to allow FCC regulation of "rates, terms, and conditions for the use of communications space on poles, ducts . . . ," et cetera. It is unclear, therefore, what authority the Commission has to require access to pole rights-of-way in the first instance or the expansion of communications space on existing utility poles or ducts or, generally, to exercise jurisdiction over problems which might arise in relations between the parties to pole attachment arrangements. This authority should be clarified.

In conclusion, this bill addresses a number of issues relevant to the overall regulation of both mass media and common carriers under the Communications Act of 1934. For example, the bill establishes standards for the appropriate Federal/State regulatory roles, principles of cost allocation and cost accounting for rate regulations of different communications services and principles of access at reasonable rates to common carrier facilities by potential service competitors. Passage of this bill will establish precedents for these issues which may prove controlling in different communications policy contexts. We believe any principles expressed in this bill should be carefully reviewed to ensure they are consistent with the overall direction of national communications policy.

The Office of Management and Budget advises that it has no objection to the submission of this report.

Sincerely,

WILLIAM J. THALER, *Acting*.

ADDENDUM D

By Mr. HOLLINGS:

S. 1547. A bill to amend the Communications Act of 1934, as amended, with respect to penalties and forfeitures, and to authorize the Federal Communications Commission to regulate pole attachments, and for other purposes; to the Committee on Commerce, Science, and Transportation.

Mr. HOLLINGS. Mr. President, I introduce a bill (S. 1547) to amend the Communications Act of 1934 in two respects. First, this bill addresses problems attendant to the use of utility poles, ducts, conduits, or rights-of-way by cable television systems. The question of cable's access to utility poles owned or controlled by electric power or telephone utilities, as well as the reasonableness of the rates charged for such access, has become a matter of significant practical concern to the cable television industry, a matter which impinges upon the ability of cable television to serve its viewing public.

The second part of this bill unifies and strengthens those provisions of the Communications Act dealing with the imposition of forfeitures or civil penalties by the Federal Communications Commission for violation of the act and Commission rules and regulations.

The Commission's forfeiture authority would be enlarged in scope to cover persons not now under forfeiture provisions.

I believe that it is imperative for Congress to act in these two areas now, without awaiting a more thorough review of the basic statute governing the entire national communications structure. Furthermore, I think it appropriate to consider these two provisions in tandem as they both involve Federal regulatory intervention in areas where the need for prompt, effective action is becoming increasingly apparent.

The pole attachment provision which I introduce today is the outgrowth of an agreement on draft legislation reached by representatives of two of the affected parties, namely the National Cable Television Association and the National Association of Regulatory Utility Commissioners. I understand that other interested parties have not participated directly in these negotiations.

The bill establishes Federal Communications Commission jurisdiction to regulate the rates, terms, and conditions for pole attachments for wire communication if the pole, duct, conduit, or right-of-way is used in whole or in part for wire communications, and is owned or controlled by any person who provides telephone service or electric energy to the public. Such Federal jurisdiction would not be exercised in any case where a State authority regulates those rates, terms, and conditions. The bill requires the Commission or the State authority, as the case may be, to assure that only "just and reasonable" rates are charged for pole attachments, and sets forth certain parameters to this standard.

My purpose in introducing this pole attachment measure at this time is to provide a framework for further discussion and consideration of a very complex matter which raises broad legal and economic issues of utility regulation and communications policy extending beyond the immediate practical problems faced by cable television operators.

Indeed, this proposal is only a modest first step, and implicitly raises many questions which may require additional statutory refinement. For example, we should examine the appropriateness of delegating to the FCC jurisdiction over nontelephone company practices not heretofore within the ambit of that agency's authority. Moreover, we should consider whether pole attachment and conduit space agreements constitute "communication by wire or radio" within the meaning of that phrase under the Communications Act. Perhaps, after further deliberation, it will be shown that

pole attachment legislation should more clearly circumscribe the rate-setting authority of State regulatory bodies which exercise pole attachment jurisdiction.

Finally, while this draft proposal speaks in terms of regulating the "rates, terms, and conditions for the use of communications space in poles . . ." the proposal addresses itself only to rate regulation. The draft offers no specific mandate to the Commission to require access to poles in the first instance, or the expansion of cable communications use on existing or newly available poles. I hope that all of these considerations and others will be explored in the near future in committee hearings, at which time all interested parties will have an opportunity to present their views and perhaps to suggest alternative legislative approaches which might better accommodate the concerns to which I have briefly alluded.

Nevertheless, the proposal which I offer today is a constructive first step in recognition of a Federal interest in assuring that all those providing communications services are able to use existing communications space on poles which are owned or controlled by regulated utilities. Of ultimate concern, however, will be the effect that any legislation in this area will have on the interests of the consumer, and by "consumer" I mean not only the cable television subscriber, but the consumer of electric power, telephone and other public services.

The forfeitures section of this bill is identical to S. 2343, which was passed by the Senate last June.

The Federal Communications Commission testified last year to the Commerce Committee that its existing forfeiture authority is inadequate effectively to enforce the Communications Act of 1934. The limitations period within which a notice of apparent liability must be issued is unrealistic in light of the necessary preliminary field investigations required. The maximum amount of forfeitures permitted for

single and multiple offenses are unrealistically low to form an effective deterrent or to provide sufficient penalty to warrant the attention of Federal prosecuting authorities.

This bill would enlarge the scope of forfeiture liability to cover all persons subject to the Communications Act—such as cable television systems, users of experimental or medical radio equipment, persons operating without a valid radio station or operator's license, and some communications equipment manufacturers. This expanded enforcement authority will be especially important since the number of cable systems can be expected to increase in the coming years, and, of course, the number of licensees, as well as persons operating without required authorizations, in the citizens band radio service, has increased dramatically in the recent past.

Additional alterations in the existing forfeiture revisions would be accomplished by extending the limitations period within which the Commission must act, granting a greater degree of procedural flexibility, and by raising the maximum forfeiture that could be imposed for single and multiple offenses.

Significantly the FCC would be required to provide a personal interview and a "second clearance" before levying a fine on all persons subject to FCC regulations who logically would be expected to be unfamiliar with the FCC's rules and regulations. Moreover, with respect to cable television in particular, it should be remembered that the purpose of this bill, as with its predecessor bill last session is not to create general forfeiture liability for that industry, but to treat all parties subject to the Communications Act equitably. Consistent with past practice, the FCC, I trust, is unlikely to use its new authority over cable to harass small operators for insignificant and isolated technical violations which have insignificant impact on broadcasters or cable subscribers.

However, as the Commerce Committee stated in its report on S. 2343, this bill predecessor, persons wishing to use the Nation's scarce electromagnetic energy spectrum for their own commercial or personal benefit must accept the responsibilities commensurate with that privilege.

ADDENDUM E

SEC. 704. FACILITIES SITING; RADIO FREQUENCY EMISSION STANDARDS.

(a) NATIONAL WIRELESS TELECOMMUNICATIONS SITING POLICY-Section 332(c) (47 U.S.C. 332(c)) is amended by adding at the end the following new paragraph:

(7) PRESERVATION OF LOCAL ZONING AUTHORITY-

(A) GENERAL AUTHORITY- Except as provided in this paragraph, nothing in this Act shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

(B) LIMITATIONS—

(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof—

(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.

(iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

(iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

(v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

(C) DEFINITIONS—For purposes of this paragraph—

(i) the term 'personal wireless services' means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services;

(ii) the term 'personal wireless service facilities' means facilities for the provision of personal wireless services; and

(iii) the term 'unlicensed wireless service' means the offering of telecommunications services using duly authorized devices which do not require individual licenses, but does not mean the provision of direct-to-home satellite services (as defined in section 303(v)).'.

(b) RADIO FREQUENCY EMISSIONS—Within 180 days after the enactment of this Act, the Commission shall complete action in ET Docket 93-62 to prescribe and make effective rules regarding the environmental effects of radio frequency emissions.

(c) AVAILABILITY OF PROPERTY—Within 180 days of the enactment of this Act, the President or his designee shall prescribe procedures by which Federal departments and agencies may make available on a fair, reasonable, and nondiscriminatory basis, property, rights-of-way, and easements under their control for the placement of new telecommunications services that are dependent, in whole or in part, upon the utilization of Federal spectrum rights for the transmission or reception of such services. These procedures may establish a presumption that requests for the use of property, rights-of-way, and easements by duly authorized providers should be granted absent unavoidable direct conflict with the department or agency's mission, or the current or planned use of the property, rights-of-way, and easements in question. Reasonable fees may be charged to providers of such telecommunications services for use of property, rights-of-way, and easements. The Commission shall provide technical support to States to encourage them to make property, rights-of-way, and easements under their jurisdiction available for such purposes.